

104  
**PRIVATE PROPERTY RIGHTS—PART III**

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Y 4.R 31/3:104-40

Private Property Rights-Part 3, Ser... **HT HEARING**  
BEFORE THE

**TASK FORCE ON PRIVATE  
PROPERTY RIGHTS**

OF THE

**COMMITTEE ON RESOURCES  
HOUSE OF REPRESENTATIVES**

**ONE HUNDRED FOURTH CONGRESS**

**FIRST SESSION**

**ON**

**THE STATE OF THE LAW IN THE TAKING OF PRIVATE  
PROPERTY RIGHTS BY THE GOVERNMENT AND THE  
EXPERIENCES IN THIS MATTER**

**JULY 17, 1995—SHERIDAN, WY**

**Serial No. 104-40**

Printed for the use of the Committee on Resources

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## PRIVATE PROPERTY RIGHTS—PART III

MONDAY, JULY 17, 1995

TASK FORCE ON PRIVATE PROPERTY RIGHTS, COMMITTEE  
ON RESOURCES, HOUSE OF REPRESENTATIVES,

*Sheridan, WY.*

The committee met, pursuant to call, at 8:45 a.m., at Sheridan High School, 1056 Long Drive, Sheridan, Wyoming, John Shadegg (chairman of the task force) presiding.

### STATEMENT OF HON. JOHN SHADEGG, A U.S. REPRESENTATIVE FROM ARIZONA; AND CHAIRMAN, TASK FORCE ON PRIVATE PROPERTY RIGHTS

Mr. SHADEGG. Good morning. Welcome to the hearing of the Committee on Resources' Task Force on Private Property Rights.

My name is John Shadegg. I represent the 4th District of Arizona, and I'm going to begin by apologizing for the physical layout we have here. I am standing because I'd like to be able to see you and I'd like you to be able to see me. Unfortunately, we will not be able to conduct the whole hearing in that fashion, but we'll at least start and you can get an idea of what we all look like at the beginning in that fashion.

I am very appreciative that all of you are here for this very important hearing. I think it is, in fact, an important hearing. It is an opportunity for us to exchange ideas and views. Let me begin by simply making that point. Throughout the nation, we have been holding hearings, not only on the issue of private property takings, but also on the issues of endangered species and wetlands.

And I must tell you, each time I have attended those hearings or have read about those that I have not attended, I have been surprised at one thing and I'm going to open at this very beginning and make this point and then let it go, and that is at those who would criticize the process of holding a hearing. I simply do not understand that. In America, we exist in an open society where we debate ideas. That is what the founding fathers intended. This hearing is an opportunity for people who believe in private property takings legislation as well as an opportunity for those who oppose private property takings legislation to make their views known, and the day in America when we stop listening to each other, the day in America when we stop public discourse on issues, the day in America when we no longer are willing to hear what our opponents believe or say and are only willing to listen to ourselves is the day that tyranny begins and that we lose freedom.

We are joined this morning by four members of the Private Property Rights Task Force of the Resources Committee. I am thrilled

to have with me your own Congresswoman Barbara Cubin who is the leader in bringing us here today and a tremendous and valued member of not only the Private Property Rights Task Force but is also vice chairman of the Resources Committee, and I will defer to Mrs. Cubin in just a moment but I hope you all know her well and are appreciative of having her back with you this morning.

We are also joined by Congressman Jack Metcalf on my far right, your far left, of the State of Washington and Congresswoman Helen Chenoweth of your neighboring state Idaho.

I am pleased that we could be here. I might also begin by mention of the schedule for this particular hearing. This hearing was scheduled over a month ago and at that time it was picked to be held today because no votes were to be conducted in the U.S. House of Representatives today. As I'm sure Senator Wallop is very much aware, the schedule of the United States Congress is not always within the control of one member or one committee, and late Wednesday afternoon we were advised by Dick Armey that the schedule indeed for the House had been renegotiated between the majority and minority parties and that votes would have to be held today and that they would have to begin this afternoon some time between 5:00 and 6:00 in the evening.

What that meant was that many of us who had planned to come here last night and come by commercial transportation and to return to Washington, get into Washington somewhere around 11:30 this evening, could not do that consistent with our obligation to represent our districts. As a result, we got up this morning in Washington, D.C. I got up a little bit after 5 a.m. I am told that other members of the committee who had to do more preparation than I got up closer to 4 a.m., and we got on a plane and got here in time to hold this hearing and then to get back for votes.

Now, why is that important? It's important for two reasons. Because when we learned that there would be votes this afternoon, more than 20 members of your community, more than 20 people from the western United States in and around Sheridan had already either prepared or planned to prepare and begun the preparation of their testimony so that they could speak on these issues today. This hearing is a part of a series where we, as the Republican party of the United States Congress, the majority party, promised to bring government back to people and to come outside the beltway, outside of Washington where we hear from professional witnesses and professional lobbyists all the time and rather try to get back to where citizens such as yourself could see a Congressional committee at work and could have an opportunity to present testimony and see how the Congress works.

With those 20 people having already prepared or begun the preparation of their testimony, we thought it unfair and inappropriate to cancel this hearing and that left us no option but to fly here early in the morning, do our business and fly back in time to be in Washington for votes which will begin this afternoon around 5:45 and will continue, I anticipate, until close to midnight tonight, as they continued until midnight two days last week.

Our mission today before you is to hear from you, to learn your experiences with issues of concern to you and of concern to the issue of private property rights. On that regard, let me say that I

very much appreciate the participation of each on the committee. Our other purpose, in addition to hearing from you on the issue of private property rights, is also to hear from you on issues which affect the Endangered Species Act and to help the chairman of that task force in rewriting of that legislation and other legislation which will come before the United States Congress.

One of the issues, I note, is a concern and a legitimate concern that perhaps this hearing should have been held earlier. I would have preferred that it had been held earlier. Mrs. Cubin certainly would have preferred that it could have been held earlier. Unfortunately, that was not possible, but please let me explain to you, it is very important that you understand the legislative process in the United States Congress. The mere fact that one private property rights piece of legislation has passed one body of the United States Congress by no means whatsoever makes this issue moot. First, that legislation is sitting in the Senate. There will be companion legislation which will or will not pass the Senate and then go to a conference committee because under no circumstances will the legislation which passes the Senate on this issue of private property rights be identical to that which passed the House. That means our first opportunity to readdress the issue of private property rights and takings legislation will occur yet this summer or early next fall in dealing with the legislation which the House has already passed as it comes back to us from the Senate.

But beyond that, and let me make this point clear, many people on the environmental side of this particular issue feel strongly and Secretary Babbitt, who is an outspoken and indeed very vigorously outspoken opponent of takings legislation in general and specifically of generalized takings legislation like that which has already passed the House, has indicated his preference that any takings legislation occur within each individual act. We had him before the Western Conference. I know Mrs. Cubin was there when I asked him about this issue and he said that he thought that the Congress, if it dealt with private property takings, which he thinks indeed it probably must, that it should do that on a bill by bill basis. That is that we deal with the issue of takings within the Endangered Species Act, that we deal with the issue of takings within the Clean Water Act, that we deal with the issue of takings within the Clean Air Act and that we deal inside each of those specific pieces of legislation.

Well, the other reason that this issue is not moot by any stretch of the imagination is that probably the single most important piece of legislation on private property takings this year is the Endangered Species Act reauthorization which will be before the Congress between now and September and will very much be of concern. So those of you who have attended today, those of you who have prepared testimony, those of you who are listening, must all understand that what you are here for is indeed very relevant and that the testimony the witnesses bring forward indeed will impact that legislation.

Let me make one further point. It is very important that you understand that we are on a very tight schedule so that we can get back for our votes. The people of the 4th District of Arizona want me to vote on each of the issues that will come up tonight. Many

of you perhaps would like to testify today and will not be able to. Some of you may have already asked, some of you in the course of listening today may decide that you wish to testify. This is a full blown hearing of a congressional task force. Under the rules of our committee and under the rules of this task force, anyone who wishes to submit testimony for consideration and for inclusion in the official record of this hearing may do so. The record will remain open for a full two weeks following today's hearing. If you wish to submit a statement, you must keep it to less than, I believe, five pages typewritten and submit it to the U.S. House of Representatives Resources Committee, Private Property Task Force, Washington, D.C. It will get to us and it will be included in the official record of this hearing just as though you were here and testified in person.

Everyone on this committee is very interested in sensible environmental laws. You will hear today a balanced presentation from those who advocate private property takings legislation and from those who oppose that legislation. We believe that we are here to hear input from all sides and, indeed, that will occur. There has been much discussion of the fact that our current environmental laws are achieving some of their ends but, indeed, I doubt if anyone will come before you and say they are all achieving all of the ends intended.

This is our fourth hearing. The first we held in Washington, D.C. where we heard from a number of legal scholars on the issue of private property takings. One of the most important points that I should make about that is that this is an area where, indeed, the courts have invited the Congress to legislate. In America, that is the system we have. Private property takings legislation and private property takings issues arise out of the 5th Amendment of the U.S. Constitution but, as is the case in many areas, including—and the example I like to cite is the civil rights area—whenever the Constitution addresses an issue, that does not mean it is fully explored by the Constitution and it is indeed the Congress which is obligated to write the laws to more clearly define what the Constitution says.

In this instance, our task is to determine whether or not takings legislation is necessary and what that takings legislation should provide.

We held a second hearing in Phoenix, Arizona and we've held a third hearing in Washington, D.C. where we had 18 witnesses from across the country. They told us about heritage corridors, critical habitat areas, endangered species enforcement, enforcement of other current environmental laws, wetlands designations, national park expansion, scenic designations and Federal permit requirements often affecting private property rights.

We're happy to be here in Sheridan to hear from you, your experiences, and I hope everyone understands that we will hear from all perspectives in our discussion today.

I am pleased at this time to ask Mrs. Cubin to make her opening statement for your benefit. Thank you. Mrs. Cubin.

**STATEMENT OF HON. BARBARA CUBIN, A U.S.  
REPRESENTATIVE FROM WYOMING**

Mrs. CUBIN. Thank you very much. I am truly honored to be home today, as you should be honored that we have a committee of Congress here with us to take the testimony of the people of Wyoming. That's been one of the things that we in the new Congress, the 104th Congress, want to do. We want to get out to the people. This is where the problems are and this is where the solutions are. So it's very important that we hear the testimony of not just the people on the panel but of all of you.

We have some dignitaries today that I would like to acknowledge. We have Senator Malcolm Wallop with us and I certainly thank him. He spent an extra day here and changed his schedule around so that he could be here with us. We have Bill Benschel, who's a state legislator, Glenda Stark, Carolyn Paseneaux and Bruce Burns. So we have five state legislators but most importantly of all, in the audience are my mother and my son and my little friend Travis. So I just wanted to welcome them.

I also want to thank Representative Shadegg and the other committee for coming all the way to Sheridan. There's been a lot of turmoil. We've struggled to get here, but we're glad that we are here.

I want to say that many people who are concerned about private property takings, private property rights, are third and fourth generation ranchers. They make their living off of the land. Now, I don't believe that these people who make their living off of the land want in any way to damage the land. Many of others of you who are here today want a clean environment and want laws that will enable us to have a clean environment. I think we all agree that we want a clean environment and I think we can achieve one while still respecting private property rights. We can not destroy private property without destroying our own strong economy. It's not just the landowners that will suffer if we allow private property rights to be taken. It's also the people who depend on government for assistance because, you see, our tax base is eaten away by the more land that is taken from private property into the public sector, we lose more and more of our tax base.

I think the colonists that faced tremendous hardships to grant us the freedom that we have never envisioned that our government would be taking private property rights in the way that is happening today. Land owners just don't know what they own any more. I've heard people ask the question: Who actually owns the land? Who has the right to decide what the landowner can do on their own land? Should landowners be compensated if their right to use the land is denied? How do we protect the environment? What is in the best interest of the public? These questions lie at the heart of the debate and I am sure that we will have answers from our panel to these questions today.

I'd also like to let you know that any of you who are sitting in the middle section, if you'd like to take a few minutes and move to either side so you can see better, we'd certainly like to have you do that. But if you're comfortable where you are, just stay where you are.

Again, it is truly an honor for me to be here. My grandfather was born in Sheridan. I don't even know how many years ago. Over 100

years ago now. I feel like I have roots here, and the committee has all mentioned the beauty of the land as we came in, and I very much feel that I'm part of the land. I'm a fifth generation Wyomingite. My great-great-grandfather came to Wyoming in 1847, which is before Wyoming was even a territory. That was mountain man era, and that's what he was. He was a trapper. That's on my mother's side of the family. Then on my father's side of the family, his mother homesteaded as a single woman north of Casper where I live now. And so my ties go deep into the land, and like all of you, I want a clean environment but I also want to protect our citizens and I know that we can do that. We are Americans. There is nothing that we can't solve if we work together. We've won two world wars, we have won the cold war. If we will only cooperate, be kind to one another and cooperative with one another, then we will solve this problem, too.

Again, thank you for being here. It's truly my honor, and I welcome the rest of the committee.

Mr. SHADEGG. Thank you, Mrs. Cubin.

With that, let me briefly explain the light system. We are on a tight schedule. You will see on the desk to my left and the audience's right a series of lights. Each witness will be asked to keep the summarization of their statement to five minutes. So long as the green light is on, you are in the middle of that. When the yellow light comes on, it's a warning that you have one minute to conclude your statement and when the red light comes on, if you would please try to conclude as rapidly as possible. I would ask each member of the committee, to the extent that we do question witnesses, to remember that time is extremely short and that they are bound by the same light system.

We are, in fact, privileged to have Senator Malcolm Wallop here, a leader in the U.S. Senate for many years, a leader on this issue, and we're privileged to have you lead us off, Senator Wallop.

#### **STATEMENT OF HON. MALCOLM WALLOP, A U.S. REPRESENTATIVE FROM WYOMING**

Mr. WALLOP. Mr. Chairman, thank you very much and welcome to Sheridan. Barbara, thank you for bringing your committee here.

With permission of the committee, I'd like to have my entire statement in the record as if it had been delivered.

Mr. SHADEGG. Granted.

Mr. WALLOP. I want to take a minute to respond to some advertisements that have been going on in this state in anticipation of this hearing. It strikes me as predictable that the environmental community, when it has no argument left, indulges in personal attacks, in this case, on Congresswoman Cubin, and hot buttons and outright lies. These advertisements the hot buttons have been churches, schools and hunters. Bit issues in Wyoming. It suggests in here that the takings legislation requires government to pay corporations and individuals for any reasonable restrictions placed on landowners. That's an absolute lie. An absolute fabrication. It says that if this idea were put into law at the state level, counties would no longer be able to endorse zoning requirements without compensating owners. That is a lie. That is an absolute falsity. Can you imagine paying a landowner, here we go with the buttons, not

to locate a pornographic peep show next to a day care center? Mr. Chairman, that is just ridiculous. Or paying a landowner not to locate a bar near a high school? These are reasonable rules. All of those have nothing to do with takings legislation.

Federal level. Government would have to pay industries and developers not to pollute. Mr. Chairman, that is an absolute fabrication. That has nothing to do with what could come under this legislation in any forum that I have seen. Polluting is a harm to a neighbor and brings with it a cause of action. The rest of the Constitution, they don't care about the 5th Amendment to the Constitution, they don't care about the rest of the Constitution which requires us to live in a civil society.

It says, "Industry and House members try to hide behind the label of property rights when defending the legislation. The government already compensates property owners when it takes property for public purposes." Mr. Chairman, if that were the case, this would not be an issue in America and abroad in the land today. It says, "Takings legislation is a polluter's bill of rights." That is a lie. It says, "Through compensation requirement, takings legislation will cost Federal, state and local government billions in new taxes. American taxpayers can not afford the price tag. It is a fight between special interests who would radically alter the Constitution and have the rest of us foot the bill."

Mr. Chairman, the other side of that coin is what happens—what these people are saying is that all Americans are entitled to have one or two Americans solve their problems, and that isn't the way the country was organized.

Also, I'd like to say one of the things about takings legislation, when I first got to the Congress, I introduced a bill to the Surface Mining Act which required the Federal Government, if it denied access to minerals because of alluvial valley floors to, either through exchange or acquisition, compensate the owner of the minerals. If it is in America's interest to protect alluvial floors, it is in America's interest to protect the property underneath it. Eighteen years after I did that, Mr. Chairman, a Sheridan trust got \$65 million in a takings case. That trust provides education for people in this county. Nobody can tell me that this county was abused by that takings case. In fact, what happened was that property rights, property values and other things stayed in place.

Having relieved myself of that, I'll do what I can with this statement.

Mr. Chairman, many books have been written about government abuses and I commend to you a book entitled "Red Tape in America" written by Craig Richardson and Jeff Sebart, who used to work for me, and published by the Heritage Foundation. It's a compilation of citizens' experiences detailing government abuses at the hands of the Fish and Wildlife Service, Bureau of Land Management, the Internal Revenue Service, Food and Drug Administration, Department of Labor and a myriad of other government agencies.

To see property rights as simply rewriting ESA is a major mistake. Mr. Chairman, I have a couple of details, but these things always come about. Yesterday's newspaper in Casper Star Tribune has a story of a takings case in Kingston, Washington. So these are

not brand new. But let me give you one in particular that I think summarizes where we are.

That's the story of Marge Rector from Texas near Austin. She bought 15 acres of land to build her retirement home. She paid approximately \$830,000 for her dream. In 1990 after the Golden Cheek Warbler was listed as an endangered species, her dream became her nightmare. Her land became more devalued until today the land once worth \$830,000 is now just valued over \$30,000. Now, that's Marge Rector's problem. The other problem is that in that town land values decreased by three quarters of a billion. The tax base of that county disappeared. Now, every citizen's taxes were raised because of it and every citizen's services were cut because of it and I think that it's important to realize that the takings issues is not just one.

Mr. Chairman, my regular statement was simply spectacular. In compliance with your rules, I won't deliver it. I commend it to your attention because the Constitution of the United States is not an item to be taken trivially. Too often in my last eight or nine years in the Senate, I would come back to Wyoming or visit other states including yours and I would visit people who were being abused by their government and they would tell me, I wanted you to know about this, but don't do anything. They'll get me. Now, when citizens of the United States say their government will get them, they view themselves not as citizens but as subjects. That's a form of government that we came to this country to remove and for us to ignore or to say that somehow or another taking care of the constitutional right to property is an abuse of some people's exercise of personal power is to say that they view this government as rulers and not as taking its power from the people.

We must understand that the government of the United States, unlike any other in the world, is based on natural law. The Declaration of Independence talks that we are endowed by our creator with certain rights. We are not endowed by the government. Those rights were expressed in the Bill of Rights amongst which was the right to private property. It is sacred and to abuse it is to abuse the very essence of what this country is and makes it unique from all the other countries in the world. So thank you for holding this hearing.

Mr. SHADEGG. Thank you very much.

[The statement of Senator Malcolm Wallop may be found at end of hearing.]

Mr. SHADEGG. Representative BenseL.

#### **STATEMENT OF BILL BENSEL, STATE REPRESENTATIVE, SHERIDAN, WYOMING**

Mr. BENSEL. Mr. Chairman and committee, I, too, want to thank you all for coming to Sheridan. I know you're running a tight schedule and I very much appreciate you coming to town here. Welcome.

I appreciate the opportunity to talk to you all today and though the U.S. House has already acted and passed regulatory takings legislation, I appreciate you coming and listening again to what we have to say.

The protection of private property rights as granted in the Constitution is especially dear to Wyoming and people who live and work in the western states. That is why these rights must remain balanced between the protection of our individual's rights, our neighbors' rights, and the public good. Reform inefficiencies in the manner in which regulations and laws work and how these impact people should be under continual scrutiny.

However, the takings legislation, which has already passed the House and is now being discussed in the Senate, is not about reform. These proposals, contrary to my friend Mr. Wallop's statement, are a formula for bigger government. Loss of public health and safety protections. They're a D.C. lawyer's heaven and taxpayer's nightmare. It destroys the fine Constitutional balance which has been maintained for more than 200 years and removes the role of our judicial system in determining what our 5th Amendment rights are.

This legislation, as passed and proposed, will be still another all encompassing one size fits all regulation passed down by the Federal Government which adds even further to the burdens and cost of our state and our local government. There are already far too many broadly written rules, regulations and laws which fail to meet the specific needs and public interests of the individuals in all our states and territories. Takings proposals, as being looked at now, will be an additional barrier to local control and contrary to the best interests of the state.

During my three terms as state legislator, I have listened to numerous concerns and complaints of Sheridan County landowners. Issues about development, growth, planning, zoning and especially property taxation have recently been the most important issues to this expanding community. Government infringement upon private property rights and heavy-handed implementation of regulations have not been priority issues of concerns among my rural or urban constituencies or neighbors. I do not, therefore, believe that this issue is foremost in people's minds. They're too busy trying to make ends meet, run their businesses, run their ranching operations, and taking care of their families.

Congress should spend its valuable time on real problems and develop real solutions for Wyoming families, workers and businesses. Legislation such as this has been rejected by the Wyoming Legislature in past years. I believe it's been five years now we've dealt with this issue. The 53rd Legislature dealt with this issue once again this past winter. Negative consequences were foreseen in this takings bill and caused significant opposition to the so-called Taxpayer Protection Act which was subsequently named Regulatory Takings.

Sponsors of the bill were forced to present a significantly watered down version on the third reading which called for guidelines to be prepared by our Attorney General to be used by our state agencies. After failing on the third and final reading, the legislation was resurrected in an uncalled for and heavily lobbied reconsideration vote and subsequent fourth reading and it passed by a slim margin.

The Sheridan County delegation, along with many other members of our House, voted against this unnecessary legislation which serves up more bureaucracy and fails to assist with the genuine

needs and best interests of our constituents today. The people of Wyoming don't want expansion in the size and cost of government. They don't want increased taxation and they don't want reductions in health, safety and environmental standards. It looks to me, Mr. Chairman and committee, that this will be the result of the Congressional proposals on takings. The question remains for me, Mr. Chairman, as to what and whose best interest this will serve. It will not be that of the public.

Many, many well-respected organizations oppose passage of regulatory takings which infringe upon our state and local rights. These include the National Conference of State Legislators, the National Governors Association, Wyoming Alliance of Municipalities, American Planners, League of Women Voters, National League of Cities. I could go on. These groups could hardly be categorized as anti-property rights.

Mr. Chairman, I was given a letter last week by our mayor of Sheridan addressing potential negative impacts of the legislation that is being now proposed and, Mr. Chairman, with your permission I will read a portion of this letter and submit it to your record.

"I understand that the takings legislation would affect the municipal level of government in not allowing the city to continue with its zoning property. We have the U.S. Constitution and I believe we do not need takings legislation to protect property rights. If Federal takings legislation is enacted, it will open the door to anyone who wishes to make a profit at the public's expense. This concerns me also as another mandate from Congress. Sincerely yours, Della Herbs, Mayor of Sheridan."

Ladies and gentlemen, to summarize remarks that I have made here this morning, any attempt to define or categorize compensable takings under the 5th Amendment or to interfere with states' rights in defining regulatory takings must be rejected by Congress if Congress in that forum is truly one representative of the best interest of the people of the United States and the people of Wyoming.

Again, thank you, Mr. Chairman and committee, for coming to hear my comments and the comments of my compatriots today.

[The statement of Bill Bensel may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.

Representative Paseneaux.

#### **STATEMENT OF CAROLYN PASENEAUX, STATE REPRESENTATIVE IN WYOMING**

Mrs. PASENEAUX. Mr. Chairman and members of the panel, I would like to enter testimony from the timber industry. They could not be here today and I would like to enter it in the record when I finish. Thank you.

Mr. SHADEGG. Without objection, so ordered.

[The statement of Jan Hagen may be found at end of hearing.]

Mrs. PASENEAUX. I am that legislator that introduced legislation on private property rights, necessary legislation, in Wyoming this past session and it was passed. Private property holds a pivotal place in the private society. It's the hinge pin on which all other civil liberties turn. The right of basic freedom for religious worship, free speech, the right to vote, all are vitally dependent on the right

to own property. If the people in their individual capacity own the land which is the wealth of society, government must depend on the consent of the people to operate. Conversely, if the government owns or controls the land through the regulation, it does not need approval of the people for its actions because it has control of the wealth it needs to carry out these actions.

A legal scholar with the Congressional Research Service of the Library of Congress called it inevitable as American industry expands, resources are developed and population grows, government will attempt to control the growth with increasing levels of regulation. Eventually this regulation will collide with constitutional property rights. Well, the day of that collision is here and yes, it is costing the government millions of dollars. The most expensive case is the Whitney Benefits Case, a Wyoming case which cost the government \$160 million and I say if the government will stop taking, there will be no money it has to pay. So few can afford to come and go to court, and that is the tragedy of this issue. The little people get taken by the government.

We in America, the country most touted for its freedoms, have created a bureaucratic monster that is slowly taking away these freedoms through a feature of their structure which combines the legislative, executive and judicial branches in one body, the combination most feared by the framers of our constitution. Administrative agencies promulgate regulations which is a legislative function, interpreting statutes in the process, a judicial function. They enforce statutes and their own regulations, an executive function, and determine whether regulations have been violated and assess sanctions against the purportedly offending party, which are judicial functions.

Many agencies have Administrative Law Judges. When courts abandon their constitutional role as guardians of rights and defer to the judgment of regulatory agencies, then our constitutional system as set forth by the framers has been radically changed.

We out here in the country are not only frustrated. We're frightened of our government. And I would like to say that no health or safety standards are compromised under the private property rights because they are legitimate police powers and can be carried out.

Now, not only what has happened is a problem but what might have occurred is a great problem and I would like to illustrate to you by talking about something that happened in the early '90's with a document named "Vision for the Future, A Framework for Coordination in the Greater Yellowstone Area". The U.S. Forrest Service and the National Park Service, which encompassed a very large area in this document, something like 18.7 million acres of Federal, state and private land within Wyoming and yes, Congresswoman Chenoweth, Idaho also. They called it an ecosystem and I can tell you that the vision document went far beyond the coordination of the myriad uses and levels of government in the region. Instead, it became a philosophical statement with primary attention given to a sense of naturalness. Nearly one fourth of the designated area was private land and I'll tell you that what would have happened is we would have been prohibited from our human activities

if they were perceived as in conflict with this sense of naturalness had this document gone through.

I would like to say that it was stopped and due to Senator Malcolm Wallop and other Congress people from the west, we only had money and time that we spent. It was not our lives and our livelihoods that finally were at stake.

As a state legislator, I am concerned what the economic cost to our state will be during the life of a project which all of America has watched, and that is the introduction of the wolf to Yellowstone Park. The Wyoming Game and Fish Department will be saddled economically and local ranchers will bear the burden of a loss of private property. It is a true unfunded Federal mandate, not only to the state but to those private citizens who are going to have to deal with the wolf.

I would like to tell you about one more instance which I have had personal knowledge of. In 1986, a retired couple found out about wetlands regulation. A government employee went out on the property and crawled around on his hands and knees and looked at plants and said, "This is a wetland", and this couple were precluded from developing that land which was their nest egg. I can see that my time is up.

I would like to mention that the banking industry—I don't see a banker on the panel, and I want to say that a major concern facing the banking community today is the unknown direction property values are taking. The primary collateral base for loans is private property, whether it be land, livestock or equipment. If laws protecting private property continue to be diluted through regulation, the value of the property will decline, as does the value of the bank's loan portfolio.

We are in a battle for America. If we abandon ownership of land, private property rights, we will abandon our liberty. I would like to say you can not, you must not let your conscience sleep in this fight to preserve private property rights in America.

Thank you for coming and I appreciate the opportunity to testify. [The statement of Carolyn Paseneaux may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.

Mr. Perry Pendley

#### **STATEMENT OF PERRY PENDLEY, PRESIDENT AND CHIEF LEGAL OFFICER, MOUNTAIN STATES LEGAL FOUNDATION**

Mr. PENDLEY. Mr. Chairman, thank you very much. The battle today over property rights is not about power for corporations, but about private citizens. As the book Senator Wallop talked about, "The Death of Common Sense," and book, "It Takes a Hero; the Grass Roots Battle Against Environmental Oppression," show the battle over property rights is the story about moms and pops all across America who fear they will lose everything.

I want to talk about five issues. No. 1, the Endangered Species Act. As a result of the U.S. Supreme Court decision in *Babbitt vs. Sweet Home*, the American people now understand the ESA is about taking private property. They also understand the ESA is about weird science. We've heard the testimony from Jack Ward Thomas and others demonstrating that the science used in the ESA

is not biological science but weird science and political science. It is critical that the Endangered Species Act be reformed to make it conform with good science and also bring it in balance so that if the American people are going to lose jobs and opportunity and their property, it's going to be for something better than flies and snails and rats.

No. 2 on wetlands. This Congress has already done a good job of moving forward on the weird science involved in wetlands policy. But let me explore another issue that still exists in the Clean Water Act. We represent a client in New Mexico who was told that his property is "waters of the United States," although an earlier document from the EPA said the property was not "waters of the United States." He was served with a cease and desist order. He did cease. He did desist. He lost his business. He went belly-up, but he sued the government to contest the finding that his lands were "waters of the United States." The Federal Government took the incredible position that he could not sue to ask a Federal judge to determine whether or not his property is a wetland until he violates the cease and desist order, thereby subjecting himself to a \$25,000 a day fine and jail time. This is remarkable in America that the price of admission to Federal court to have a judge determine if Federal agents are doing the right thing is the willingness to go to jail, the willingness to go bankrupt. I have proposed for your consideration an amendment that is before you.

No. 3, government attorneys. Congress passed laws and you know what they mean. We think we know what you mean. But government attorneys don't take similar positions. Two cases in which Mountain States Legal Foundation has been involved illustrates the problem.. One involves a property owner in the State of Michigan who challenged the U.S. Forest Service because Forest Service action was going to interfere with "valid existing rights" protected by the Michigan Wilderness Act. Incredibly enough, Forest Service attorneys took the position that "valid existing rights" only applied to mining claims. It did not apply to the property rights of these individuals. Fortunately, the court disagreed.

The second case is Texas where a property owner has lost his property because of the negligence of the United States Government. He has sued the government under the Federal Tort Claims Act. The government is taking the position, in court, that the Federal Tort Claims Act has been effectively repealed by the passage of the Wilderness Act of 1964 and the landowner has no right of redress.

Even when private property owners prevail in these cases, they have spent tens of thousands of dollars hiring lawyers to fight against outrageous positions taken by the government. I urge this committee and others to conduct some careful oversight into the manner in which government attorneys are implementing Federal laws and also their ethical obligations under Canon 7.

No. 4, land acquisition. I was in Texas speaking before a property rights panel there. A property owner approach me and told me an incredible story about being called into the offices of the Fish and Wildlife Service and being advised that his property was in fact habitat for an endangered species. He was told, "That's the bad news! The good news is someone from a land trust is here to pur-

chase your property which will probably later be sold to the United States government."

This is the gun at the head of private citizens in this country. It's a massive, massive program that the Department of Interior's Inspector General has already said is filled with waste and fraud and abuse and I think it's a program that deserves some statutory language to be adopted to ensure that these land trusts and the Federal Government behave in a responsible and proper way.

No. 5. On June 29, 1995, the Supreme Court decided the *Sweet Home* case. I would say the *Sweet Home* case is an excellent example of Congress not doing its job when 22 years after a statute is passed we find out for the first time what Congress meant. The night of the *Sweet Home* decision, I was on the MacNeil-Lehrer show opposite someone from the Sierra Club. During the course of the presentation, the man from the Sierra Club said, "The property rights advocates, the advocates of repeal of the Endangered Species Act, are extremists. They're the kinds of people who carry guns, Daniel Bloom type who blow up Federal buildings." This is an outrageous assertion. It is a lie. It is a terrible, terrible lie, and it's an illustration of the attempt by the left and by environmental organizations to link the advocacy of those who fear their government, the advocacy of those in favor of private property with the terrorists which we all abhor. If there is no link on their side between the "Unabomber" and environmental advocacy, there certainly is no link on our side.

I would encourage this Congress and this committee to do careful inquiry into the manner in which the United States Government is making representations, and I believe misrepresentations, about the threat to employees out in the field. These people, the Federal employees, are our friends and our neighbors. These are the people we rely on to ensure good management activities and I think it's an outrageous misrepresentation to assert that they're in jeopardy. We want only a peaceable approach to solve these very, very important problems.

Thank you, Mr. Chairman and committee, for coming to Wyoming.

[The statement of William Pendley may be found at end of hearing.]

Mr. SHADEGG. I'd like to thank each of you for your testimony. I know you gave serious thought to it. Let me begin by reminding committee members we need to be brief. I will try to be brief in my questioning.

First, Mr. Bensel and I would like to convey to Mrs. Herbst, the mayor, our appreciation for the opportunity to be here and some good news for her. Let me read to you specifically from the legislation and have a copy handed to you. Every piece of Federal takings legislation that I am aware of in any single form specifically and explicitly exempts zoning laws and nuisance laws. I will read to you from page 3 of the bill which the House passed and which I voted for. It appears at page 3, section 4, Effective State Law, line 6. "If a use is a nuisance as defined by the law of a state"—meaning the state of Wyoming—"no compensation shall be made under this Act."

It further says, "If a use is already prohibited under a local zoning ordinance, no compensation shall be made under this Act." Specifically with regard to the ad that Senator Wallop brought up, clearly this kind of false statement just doesn't belong in public discourse. This says, "Reasonable restrictions placed on landowners" and says, "for example, would no longer be able to enforce zoning requirements." Well, the law we passed specifically exempts zoning ordinances. They would have absolutely no effect on a zoning ordinance passed by the City of Sheridan or by the county in which this lies. Indeed, the entire takings measure that we have passed affects Federal law only.

There's a second point I want to make. I sympathize absolutely with you on this one size fits all forcing Federal law down your throat. There is only one problem with that point in this debate and it is called the Supremacy Clause. Not a single thing your legislature did, not a single thing your County Board of Supervisors would do, not a single thing the City of Sheridan could do would in any way possibly reach the takings which result from Federal legislation, be it the Endangered Species Act, the Clean Water Act, the Clean Air Act, any of the acts we've passed in the United States Congress which are, in fact, affecting private property rights because of the Supremacy Clause. The only institution with the jurisdiction to protect people from takings by the Federal Government is the United States Congress.

Now, let me turn—and I know that's not a question, but the question I want to ask is of Senator Wallop because of his expertise in that area. I appreciate him for bringing out these false statements. I notice there's a further one in there which says that the Arizona Game and Fish Commission had estimated it would cost the Agency \$10 million a year to comply with proposed takings legislation. This proposed takings legislation which we passed. If there is such an estimate, it is exactly 100 percent wrong. It would not cost the state of Arizona or the Game and Fish Department one dime.

One of the things—and I do want to ask a question. One of the things that occurs to me is that many people in this debate, fed a constant diet of misinformation, believe this legislation will never protect them. Senator Wallop, you referred to the story from the Casper Star Tribune of yesterday. It seems to me that's a wonderful illustration of how it can affect a single family homeowner. If you have that before us and could explain to the audience how it impacts that family, I would appreciate it very much.

Mr. WALLOP. Mr. Chairman, I will, and it's not unusual and it isn't even particularly coincidental that it happened to be the day before your hearing. These stories appear, if people will read them, all the time, but there are a pair of homeowners Alan and Bonnie Riggs who lived in the Peugeot Sound, and they bought a home and they were thrilled to find that a pair of bald eagles decided that that site was attractive, too, and built a nest in a tree 50' outside their property line, not in their property. Then the state wildlife officials told them that the nest would limit what they could do on their lot. They had to sign a 32 page eagle management plan calling for nearly all of their newly cleared parcel to revert back to forest, required them to plant a screen of evergreens 15' in front of

the house, trees intended to block the eagles' view of their house, and the Riggs said that they complied with all of these things because they still loved their property and it was a property that had a lot wrapped up in. Along come the Fish and Wildlife Service and said that the trees were insufficient and so they took them to court and caused them to be cited criminally and to defend themselves in court.

Mr. Chairman, one of the examples in my statement refers to a group called the Bakersfield Five. The Bakersfield Five were five residents of the residential area of Bakersfield, California. Housing and Urban Development decided that they wanted to put in that residential area a group home. In order to have the group home, it required a change in zoning requirements, the government requiring the local government to make a change in zoning requirements. The local government cooperated and these people, as was their right, petitioned the court to set that change aside and the court sided with them; and HUD, in its rage that anybody would dare talk against the actions of the government, charged them with felony violations of the Fair Housing Act and the FBI came to their homes and the IRS came to their homes and they finally said, we didn't realize how serious the government was about imposing its will on it. We take back, we withdraw our complaint. And HUD refuses to drop the charges against them, wants a felony conviction. Part of that was the attitude of the recently departed assistant secretary who said, "In America, free speech has its limits and its limits are government purpose."

All of us lose property rights. Our freedom is a property right. This takings issue, I was stunned to listen to Representative Benson's view of it. There is nothing in there that orders the state or local government to do anything. This is about the behavior of the Federal Government and it's loose and it's violent and it needs to be contained.

Mr. SHADEGG. Thank you. I see my time's expired. I guess I must say that I am not aware that bald eagles are offended by being able to view houses. Indeed, I've heard that on the east coast they have roosted in large, tall, skyscraper-type buildings. But if they are offended and so offended by being able to view from their nest a house of a couple that owns several acres and if that house can not then be built and they lose, as the Riggs said, 90 percent of the value of their property and if indeed America believes protecting the eagle is that valuable, it is a total loss to me why the Riggs should, as opposed to all of us, pay for the complete loss of the value of that land.

Mr. WALLOP. I agree. I must say, Mr. Chairman, that we have annually four or five bald eagles that visit us all winter. They don't seem to be offended. They come every year and they can see the same house every year.

Mr. SHADEGG. They haven't dropped you a note that they don't like the sight of your house?

Mrs. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman. I will be very brief.

I would like to ask Representative Bensel what is your reaction when you hear stories like the Riggs' and other takings stories? What is your reaction to that?

Mr. BENSEL. Representative Cubin, my reaction is that I want to hear the particulars. What I hear going around in our society today in political circles or in society in general are so much innuendo. I want to know the particulars of that issue. Why wasn't it resolved? In particular, who is perhaps responsible for not fulfilling these requirements? How often have these issues really arisen, and why couldn't they have been done and taken care of on an individual basis versus with some new broad based, very sweeping legislation that will change our constitutional initiatives? That is what I want to hear. I want to ask questions. I believe that's what I've been trained to do by my parents and that's been enforced by the legislature. Ask questions. I don't want to hear just a brief overview. I want to hear particulars. Perhaps we can talk about that later on with my cohorts. I want to hear the details.

Mrs. CUBIN. I hope you will stay and listen to the testimony. That's what this hearing is about. We are having this hearing so that you can hear particulars, and I'd like to just take that one step further. Do you think that possibly the accusations and the innuendos that were in the article or in the half page ad could also be lacking in information? For example, the zoning and the things that Senator Wallop and Chairman Shadegg have pointed out. Do you think that it works both ways?

Mr. BENSEL. Mrs. Cubin, what I have seen coming out of the press and given to the press recently, I question a lot of things I see.

Mrs. CUBIN. I think what needs to be done then is people need to read the bill and when they read the bill, it becomes very clear that these things are not true.

Senator Wallop, since I've been in the Congress, I receive about 1,000 letters a week. Many, many, many letters are from people whose property rights have been taken from them and they are complaining about that. What was your experience while you were in the Senate? I'm speaking, of course, in reference to Representative Bense, who says that he does not hear complaints.

Mr. WALLOP. Congresswoman Cubin, I was like Representative Bense, had no corner on listening and no corner on examining. Some of what I heard wasn't true but too much of what I heard was true and too much of it took place in this state and it isn't just big ranchers. It has been people who have had little properties.

Over in Jackson, a developer was taken to bankruptcy by the Fish and Wildlife Service who said that they had broken bigger people than him in Texas, because his little development was wetland, or part of it was a wetland. And the fact of the matter was that there were developments that preceded his all around that property on wetter lands than was his, and they would not admit to any mitigation of this problem. They took him to bankruptcy.

These are problems that exist and I know them to exist. Some do not. I agree with Representative Bense. But there are too many that do exist, and the reason for restraining Federal action is obvious when you see it. This is a country based on the Constitutional right to property and it's the right to abuse, notwithstanding what the other side says. Owning property isn't a license to abuse and property owners who want to build houses or develop little ponds

or other things are not people setting out to abuse. The fact of it is they are ordinary citizens entitled to rights.

Mr. BENSEL. Mr. Chairman, if I may make a comment. Reading your Congressional record here, we're talking about nuisance and already prohibited zoning ordinances. I pointed out in my testimony that we are a growing community. We have new businesses moving into town. We have a lot of construction going on and, as I mentioned, as a result of that, our property taxes are becoming a headache with the sheer demand for housing. As we grow, we're going to be facing more challenges, more problems with trying to preserve open space and family agriculture.

Right now continually we're seeing houses building up on the hill. That's taking land out of production. In this one instance that we're talking about in local zoning ordinances, Mr. Chairman, we may need to look at some zoning in the future. We don't like zoning. We feel that sometimes yes, it does infringe on our property rights. We want to do it right, but we also want to preserve the quality of life that we have here and continue to grow, continue to develop the way we should, wisely, in our community and in our state. When we are prohibiting any future laws or ordinance, I guess that's one instance, Mr. Chairman, where I'm a little bit worried.

Mrs. CUBIN. May I respond? Thank you, Chairman Shadegg. But you have to remember, this applies to Federal laws only, Bill. It doesn't apply to the city zoning and the state. It's Federal laws only.

Mr. BENSEL. It simply has no effect whatsoever on state or county or local zoning period.

Mr. SHADEGG. Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman.

Mr. Pendley, in your written testimony that you didn't have time to give, you mentioned a bumper sticker, "The bumper sticker I have seen says 'I love my country but I fear my government.'" What did you mean by that?

Mr. PENDLEY. Well, that is the sign I keep seeing all around the country. I've been in every county in the West giving talks and in court and visiting with landowners and property owners. I'll tell you what I see is the incredible power of the Federal Government in its enforcement ability. The thing that's been lost in the *Sweet Home* decision is not only the fact the Supreme Court said now the Federal Government has power over the two thirds of this country that is privately owned but also that the power is a criminal provision, the ability to criminally enforce these statutes.

We have a property owner, a rancher up in Rigby, Idaho, we represented, continue to represent, who had a criminal trespass action filed against him by the Bureau of Land Management for placing a fence on property he thought he owned. In fact, he had verified his ownership with county records. This is the kind of situation that, among property owners, would be settled over the kitchen table over a cup of coffee with everybody breaking out their deeds and so forth to determine ownership. However, in this case, the government came in with the aggressive, hang-them-high mentality we're seeing from Federal officials, particularly with regard to the Endangered Species Act. We have clients in western Colorado

on the Roaring Fork River who were threatened with a criminal action under the Clean Water Act. These are very, very terrifying things for private citizens and that's why I keep seeing this bumper sticker, "I love my country but I fear my government." The ability of the government to come in and destroy someone's life, to file an action for which there's no relief if you can't find free legal counsel which we provide to various clients, means one's only recourse is to capitulate.

One of these episodes, I indicated in my statement, is the story of John Shuler, Dupuyer, Montana, who went out one night when he heard his sheep in distress and was confronted by a grizzly bear. Fearing for his life—by the way, I need to point out the judge found that he had reasonable fear for his life, a reasonable man or woman would have feared for his or her life at that time—he killed the bear. He was fined \$4,000 by the government. We have challenged that claiming that the denial of the self defense claim was improper. What the judge ruled, as my statement makes clear, was that he can't claim self defense because he introduced himself into "the zone of eminent danger", his own property. His wife said, "If we didn't have Mountain States Legal Foundation, we would have been forced to capitulate." That's where property owners in this country find themselves with no options and very, very much afraid of the enforcement powers of their government.

Mrs. CHENOWETH. Mr. Pendley, I know you're an extremely busy man but would you be willing to work with Representative Benschel so he can see for sure first hand what has happened, and I will join you if you'll make that commitment. I will join you and I will also work with Representative Bentley and——

Mr. SHADEGG. Benschel.

Mrs. CHENOWETH. Benschel. Excuse me. I'm sorry. I sincerely apologize. I also would work with Representative Benschel in showing him the area in San Bernadino County, California, where I personally stood at the foundation of homes that had been burned because they were not able to keep the surrounding grasses mowed down because of the habitat of the kangaroo rat, and it became the habitat of the kangaroo rat which had been declared endangered after the homes were there. The homes burned down. People had to drive through the fire. The paint burned off their car, their tires were burned. They were trying to save their lives and get away from the fires.

I would also love to introduce you to the lady who is 80 years old who took the *Sweet Home* case to the highest court in the land. Eighty years old, wanted to cut some timber to provide a living, and they found a spotted owl in there in her timber and the spotted owl takes 4,000 acres to a breeding pair. Now, I don't even understand how they find each other in 4,000 acres. And so this 80 year old lady obviously was not able to get some income from her timber.

So you're a very reasonable man and I know you're a good legislator and you're very intelligent. I would love to be able to work with you and show you firsthand these tragic, tragic incidents, and I would solicit your cooperation with me or Mountain States Legal Foundation or anyone because I honestly believe that communication is the only way that we can solve this problem and do as much

as we possibly can to do away with the mistrust that has developed on all sides. I really would appreciate that.

Senator Wallop was able to testify to some very dramatic things and he did say in his testimony, he did go ahead and say Americans are actively frightened of their government and no longer is the government ruled by the people but, in fact, the people are ruled by the government. Americans are now too often viewed as subjects rather than citizens. He went on to say, Mr. Chairman, "An assault on any American citizen is an assault on the private property rights. Land is property, money is property, freedom is property, stocks and bonds are property, cars are property, kayaks are property, But the Endangered Species Act is an assault on the land. The present tax code is an assault on our money. The Food and Drug Administration is an assault on our freedom and until we begin to understand property rights in its entirety, then we will never win this battle. Until we wipe out all these assaults on our personal feelings, our land, our money, our rights, and our citizenship will not be complete."

I have never done that before, reading somebody else's testimony into the record. It is so outstanding, and I thank you all very much.

Mr. SHADEGG. Thank you.

Mr. SHADEGG. Mr. Metcalf.

#### STATEMENT OF JACK METCALF, STATE REPRESENTATIVE IN WASHINGTON

Mr. METCALF. Thank you, Mr. Chairman. I'll be very brief.

I'm a school teacher, 30 years, retired, and always a conservationist and a constitutionalist and I want to tell you that a lot of things we're hearing, there is a balance achievable between these two. There really is. For five years I was Chairman of the Environment and Natural Resources Committee of the Washington State Senate and I faced many of these problems and we were able to find that balance. Just a quick comment. Well, many of the horror stories we hear are because a balance is not being achieved today, and that's what we're seeking to find.

The incident in Kingston—and I have to mention that because it's about 20 miles from my home, just barely outside my district. That was a result, as I remember the story—and I didn't get to really read it carefully—but of state action, not Federal action. The state is sometimes difficult to deal with in these things, too, but the Federal Government is sometimes impossible to deal with, and that's what we have to solve and that's what we're trying to solve.

By the way, eagles are not endangered in Washington state, western Washington. At one time we lived right on the beach on Woody Island just north of Kingston and we counted 15 bald eagles standing on the sand bar in front of our house within just about, oh, let's say just over a quarter of a mile distance. When we came there 21 years ago, we didn't see nearly as many. They've come back. They're not endangered.

Second point. Eagles do not mind people. I know of a case where there's nesting or roosting tree right in somebody's back yard. They don't like it very well because there are a lot of droppings that the eagles leave on their garage roof and so forth. But in any event, eagles don't mind. These things can be solved. We can work it out.

We just have to find the proper balance, and that's what we're here to achieve today.

Mr. SHADEGG. Thank you very much. I want to thank each of the witnesses for coming and then call upon the second panel that consists of J. Harrison Talbott, Tom Rule, Dr. David Cameron, Nancy White, Harold Schultz and Ken Hamilton.

While they're taking their position at the witness table, let me advise members of the committee that regrettably we are running behind schedule and so, without objection, I feel it is as important to hear from the last panel today as it is to hear from the first panel. I made the point earlier in my remarks that we had to take some extraordinary steps to be able to get here, conduct the hearing, and get back and vote on the votes that will come up on the floor of the U.S. House today, that each of those votes is important. I think it's equally important for each of the witnesses who prepared testimony to be able to testify and so, without objection, I'm going to ask each of you to limit your opening statements, not to five minutes, but regrettably rather to four minutes, and I'm going to ask each of the members of the panel to hold their testimony to four minutes. I regret that imposition. Unfortunately, it is compelled upon us by the timing and by the fact that the votes were scheduled in the U.S. House this afternoon and by the fact that I think you would all agree that the last panel has every bit as much right to be heard as the first or second panel.

Mr. TALBOTT. I have one question—

Mr. SHADEGG. Sir, as I indicated earlier, you were entitled to contact the committee and try to be a witness but, to the extent that you couldn't do that, sir, you are, as I already explained—and maybe you weren't in the room yet—you are entitled to submit testimony for this hearing which will be included in the record of the hearing. Copies of it will be provided to members of the panel. The record will remain open for two weeks. You may write a statement up to five typewritten pages, submitted to the U.S. House of Representatives Committee on Resources, Private Property Task Force, and whatever you submit will be a part of the record and will be read by members of the committee and will be used just as though it was given live.

With that, I'd like to call on Mr. Harrison Talbott.

Mr. TALBOTT. I have one question. You said five pages?

Mr. SHADEGG. Five pages typewritten is the limit. If you get close to that, we'll take it.

Mr. TALBOTT. I thought on the original you asked for 12.

Mr. SHADEGG. We can take as much as you've provided.

Mr. TALBOTT. That's why I asked. I've got five.

Mr. SHADEGG. We need each of the witnesses to pick up the mic and use it in their testimony, and I might make one further point at this point. I understand the audience's desire to express its pleasure or displeasure. Were you to ever come to a hearing in Washington, that simply isn't allowed. I'm going to allow it today but I would like to ask you to keep it as brief as possible because it does delay our proceedings and it is important that we hear from each of the panels.

Mr. SHADEGG. With that, Mr. J. Harrison Talbott, sir.

## STATEMENT OF J. HARRISON TALBOTT, PRESIDENT, BIG LARAMIE MOSQUITO CONTROL DISTRICT

Mr. TALBOTT. OK. I ask the committee to accept my entire presentation for the record. I'm J. Harrison Talbott, 381 Palo Lane, Laramie, Wyoming 82070. I'm President of the Big Laramie Mosquito Control District and have been since 1976 when it was organized and I was the main organizer of it. I'm not a big rancher. I own 6,000 acres and it's a working ranch. We have to work to make a living.

The reason we formed this district is because we were losing weight on our animals. Second, the sportsmen, citizens, and third, we had a son who contacted encephalitis from mosquitoes. Human health is the main thing. If we ever get encephalitis in mosquitoes down there, it's going to be a catastrophe because when you eat them and breath them, you're going to get most anything they got.

In 1992, the EPA issued a statement—review draft, they call it, I guess—that we could not use 43 different pesticides and herbicides in Albany County, over 997 square miles of the county. Our mosquito district consists of 37.5 square miles of this area. This area also protects the city. We're southwest of Laramie and the prevailing winds are southwest and they migrate into town. So forming this has helped a lot more than the ranchers alone. It's helped the citizen of Laramie.

We formed a task force in 1994 to try to solve this problem. They put a bunch of people from the university on, U.S. Fish and Wildlife and EPA. I guess our Fish and Wildlife in Wyoming was not represented. But we've held meetings ever since then at least once or twice a month. I don't know as we've accomplished much, but the EPA did come up with a grant search release toads which we spent about \$150,000. To date, they have not found any toads. At one time they had about 200 toads at one place. They went in there, trying to put radio collars on them, handled them with alcohol gloves and things. They got a disease in them. Last year they said there are two. But the one thing they did do, they captured a bunch of them and sent them to different zoos. They sent them to Cincinnati, New York, and two other places. I can't say right now what they were. But in the last two weeks, Cincinnati has found a hormone to make these things breed and lay more eggs. I guess they'll lay 40,000 eggs if they're healthy. And they shipped in 1,000 of them which I think is against the law. But no one was notified or anything on it. They shipped them in there and dumped them in the lake which is only about two miles from my house.

We have worked with the Fish and Wildlife on this and have buffer zones around and we have not harmed them. In 1991, they come out with a Toad Recovery Plan which said we was using Baytex at that time which was a larvacide and adulticide and it worked real good. Now all we can use—Baytex was taken off the market. EPA claims they restricted it, but they did not. The company voluntarily quit making it because they did not have enough market to meet the EPA regulations. I talked to the EPA at the last meeting and they said they couldn't change their regulations on that to get it back, but I don't know why they can't. It's proven it did not kill the toads and everything in the U.S. Fish and Wildlife statement in this Toad Recovery Plan.

The next thing. We have a road that goes by our place which is probably about a mile and a half from where these toads are. They wanted to redo that road about three years ago. Well, the EPA come out with a plan that said we had to put toad crossings in and we had to put toad tunnels in and we had to put wings on it so that they wouldn't get on the road and get run over, everything else. I tell you, when you get into this, you get so frustrated you don't know where you're at really.

OK. Prior to—I'm lost here. I said they had spent \$75,000 a year on it. Prior to '76, Laramie and its adjacent areas had a severe problem. Mosquitoes will migrate 30 miles, they claim.

To go back to this toad, they claim they're endangered but yet they're in North and South Dakota and all over Canada and Minnesota. There's a lot of populations around. So they have really affected our program. We have to use just Malathion which is an adulticide. We have to suffer with mosquitoes for about two weeks before we can spray them to get any results. With that Baytex we could kill them in the larva and we had birth control really, and it's a mess now.

I agree with all the statements that have been made on these private rights, citizen rights. I don't think I need to go into that. I have a statement here to that effect on this. With that, I guess I'll call it quits. Thank you.

[The statement of H. Harrison Talbott may be found at end of hearing.]

Mr. SHADEGG. Thank you very much, sir. We appreciate it.

Mr. Tom Rule.

#### **STATEMENT OF TOM RULE, BUFFALO LAND AND CATTLE, BUFFALO, WYOMING**

Mr. RULE. My name is Tom Rule. I'm a third generation rancher, and we own about a 2,132 acre ranch located two miles east of Buffalo, Wyoming, over half of this ranch is productive farm land which has been flood irrigated since the 1800's.

Let me sum up the takings of my private property. Our hay meadows are flood irrigated. Man-made irrigation ditches were built commencing in 1883 to bring water to the ranch for irrigation. Due to the gradual slope of the meadows, water tends to stand and not run off of the property. Consequently, a drainage ditch or channel was dredged through these meadows to facilitate the proper run-off. That drainage ditch has not been maintained since 1960. As a result, a swamp area or a wetlands has greatly increased and continues to increase. To halt the loss of my productive farm land, the drainage ditch must be redredged. But the government says no.

When I refer to owning this ranch, I use the terms only to mean we are paying off the mortgage and we are required to pay taxes on this deeded ground year after year. The truth of the matter is, the Federal Government is part owner, too. They are stealing at least 300 acres of my land via regulations.

The Army Corps of Engineers has defined those 300 acres as a natural wetland swamps. I use the term swamp because it is a more accurate description. The designation natural means I can not do anything with this land except watch more and more of my productive hay land become soured with water saturation and turn

to wasteland. So, as a result of the incredible power given to the Federal bureaucrats who apparently answer to no one, I'm being told what I can or can not do with my land. Such regulatory power makes Federal Government a de facto landlord. Don't get me wrong. I'm not anti-government, and I realize the need and purpose of a government. But in my case, they've stepped way beyond their rightful authority.

This swamp on my private property is irrigation-induced. You don't have to take my word for it. You can take the government's word for it. The Soil Conservation has stated this swamp is an irrigation-induced wetland. Irrigation-induced means that I can go in and clean out the channel, as the Soil Conservation calls it, so that the water will drain properly from my land. Natural means I can not do anything.

In documentation provided in my written testimony are letters from Phil Gonzales, current District Conservationist, and from Wallace Hoskins, Resource Conservationist, who state their information shows the wetlands/swamp on my deeded property are irrigation-induced wetlands. However, the final authority on wetlands/swamp lies with the Army Corps of Engineers.

I applied for a permit of exemption. Irrigation-induced wetlands/swamps under normal farming activities are exempted from Section 404 of the Clean Water Act. I was refused. Why? Chandler Peter of the Army Corps of Engineers stated that it was a natural draw, not an irrigation-induced wetlands, meaning I would be required to apply for a Section 404 permit under the Clean Water Act. If you'll read Mr. Peters' letter carefully, you will see that there's incredible expense in pursuing a permit under the Section 404 of the Clean Water Act. This permit includes vegetation, soils and hydrology studies by professional consultants, detailed maps of wetlands/swamps, contact and consultation with other Federal agencies and mitigation, creating, restoring or enhancing other wetlands/swamps to offset wetland impacts on my ranch. All of this expense is just preparation for qualification for a Section 404 permit. I could go through all of this expense and still be turned down.

I conclude by saying emphatically that the Federal Government has taken without compensation more than 300 acres of my land. Please note that the last portion of Amendment 5 of the U.S. Constitution says, "Nor shall private property be taken for a public use without just compensation." Federal regulations violate the Supreme Law of the Land, the U.S. Constitution, which whenever they tell me or anyone else who owns private property what they can or can not do with their private lands.

It's interesting to note that there's no public benefit from these wetlands on my ranch. Chandler Peter came to see my swamp one day and told me it was of the poorest quality because nothing would live in it. Yet, I can not touch this holy ground.

Thank you very much.

[The statement of Tom Rule may be found at end of hearing.]

Mr. SHADEGG. Thank you very much, Mr. Rule. We appreciate it.  
Dr. David Cameron.

## STATEMENT OF DR. DAVID CAMERON, PROFESSOR EMERITUS AND RANCHER

Dr. CAMERON. Thank you, Mr. Chairman. It's a privilege to be here and I hope my words will be useful.

I speak today as a third generation Montana rancher. The family has been grazing in Montana for over 100 years and we've been more than 50 years at our present location south of Great Falls. I realize I'm an interloper into Wyoming with all the others here, but I hope you'll hear me.

What I wish to relate to you in the next couple of minutes is my personal experience with both perceived and, I think, real intrusions of the Federal Government into my attempt at ecological restoration on our own property.

The Cameron family has always been friendly to wildlife. Sometimes our neighbors think we're a little too friendly, but we harbor deer, elk, coyotes, mountain lions, and soon, I suppose, wolves. I thought I might leave as a legacy to my children and grandchildren at least the possibility that we might reintroduce the Montana grayling to some of the reaches of our creek that runs through the ranch. The Montana grayling is a close relative of the Arctic grayling which abounded in the upper Missouri River when Lewis and Clark came through and they have retreated, for whatever reasons, to just a few small reaches in the upper Missouri.

I can't see that any major ecological change has occurred in the last 100 years, and so I called upon my colleague—I'm also a professional biologist at Montana State University—to examine our creeks to see if there weren't some regions where we might attempt to reintroduce the grayling. To our great pleasure, he determined that a tributary called Elk Creek was probably one of the more propitious ones in the state and we made the necessary arrangements with the State Fish, Wildlife and Parks Department. I had volunteers from all over the state, including people as far as away as Wisconsin, who would come out and do spade work and we thought we were doing a good deed.

Then one day Dr. Kaya, my colleague, came in with a very long face and said, Dave, I've got to tell you that the Fish Wildlife Department of Montana is very upset because the Federal Government, namely the Federal Wildlife Service, is about to take the management of the Montana grayling out of the hands of the state because they're going to list it as an endangered species. He said, you've got to think about this before you proceed with this project. So I talked with Federal agents and with Fish, Wildlife and Parks people, and I of course read both the popular press and the literature that ranchers receive about the heavy handedness of the Federal Government and very reluctantly I decided that the six families that depend on their existence through the prospering of our ranch operation as well as my own family, that we could not afford to take the chance of harboring an endangered species on our property and so we scotched the program. It was a very sad day and I certainly look forward to the day when we can again consider reintroducing the grayling and any other troubled species that might choose to live and flourish on our property.

I think that only by strengthening property rights can you assure for me and my children that this habitat which we have nurtured,

I think, quite successfully these 50 years can be passed on in a reasonably healthy form. Property rights protect me from intrusions by my neighbors and these neighbors can be private people or government. We have near us a state game range. We have a wilderness area nearby. We have national forrest. We have state lands and so forth.

On your long trip back, I hope you'll look at the three pages of written submission that I have presented. I have a few suggestions there. I ask you to compare the state of the ranch lands in Montana with Yellowstone National Park. I think there's no comparison between privately protected and public lands. I ask you to think about how the state of Montana years ago wisely put the management of its school trust lands into the hands of those who lease the land, almost entirely. They only visit these lands on our property once every 10 years. They say, treat it as your own and our children will benefit from that.

Thank you very much.

[The statement of David G. Cameron may be found at end of hearing.]

Mr. SHADEGG. Thank you very much. A very fascinating story. Nancy White.

#### STATEMENT OF NANCY WHITE, WYOMING FARM BUREAU, RANCHESTER, WYOMING

Ms. WHITE. I'm Nancy White and I'm from Ranchester, Wyoming. I'm representing the Farm Bureau but I'm also a member of the Wyoming Stockgrowers, and I would like to tell you the tale about the prairie dogs. We join Fort McKenzie and Sheridan, Wyoming. There are about 600 acres of infested prairie dogs in this area. The land is under the jurisdiction of the Department of Engineers. It is today leased by Mr. Don Roberts for grazing and part of it the Wyoming National Guard uses.

I started my communications to get rid of the prairie dogs with Senator Cliff Hansen in the early '70's. He told me to contact the Department of Engineers in Idaho who in turn directed me to the U.S. Fish and Wildlife and Wyoming Game and Fish. Larry Bourett, who was Wyoming Agriculture Secretary from '75 to '78 offered to help. None of us got anywhere except to receive wordy letters from the powers in these organizations that quoted rules and regulations and that ended it each time. A lot of words and no actions is the best way to describe it.

The big and driving force was and is environmental assessment because of the fear that there was one or more black-footed ferrets in this area. The black-footed ferret is an endangered species. I know for sure there were at least three assessments. I am sure there were more, but I'm vague about it because I threw my files away. After 30 years, they wouldn't hold any more. No black-footed ferret was ever found, and I'm sure to the disappointment of those people who were being pressured to do something to clean up the mess at Ft. McKenzie and help the joining landowners.

All during this period of 25 years or more, the landowners adjoining the fort were doing their best to control the prairie dogs with the various permissible poisons which have changed over the years. I would like to briefly describe to you how this is done today. It

is a laborious and time-consuming and hardly cheap work. A pill has to be dropped in the prairie dog hole, at which time the moisture activates it and a poison gas is released. There are thousands of holes. A gentleman who contracts to eradicate prairie dogs tells me he received \$10,000 in the last two years from three private ranches adjoining the fort to poison prairie dogs. We paid him three thousand and some and also we paid \$409 for the poison. The cost is prohibitive year after year, and it is year after year.

As long as my husband's been there, his favorite saying has been, "One dies and 10,000 come to his funeral and they never leave." As long as the fort has them, they will be on the neighbor's private land. No one has ever been able to teach them about a fence line. More importantly, all the environmental laws and rules that have caused a lot of this completely ignores the fact that prairie dogs make holes that are dangerous to horses and cows. They cause erosion and wreck grass. In other words, our livelihood. A real environmental disaster.

To effectively eradicate the prairie dog, poisoning should take place at least three years in a row with follow-ups yearly. Mr. Roberts and I prevailed upon Governor Sullivan four years ago to help us and he did. Somehow the National Guard got some money and they worked on the prairie dogs one year and for a while the next year until the money ran out.

Mr. Shadeegg, I tell you how Federal laws and regulations affect the value of private property. I'm not a real estate agent. I can't do that except to say it devalues it, it costs an extraordinary amount of money. We are ranchers and we are good at what we do or we wouldn't be in the business, and we are environmentalists. What has been going on at Ft. McKenzie is the worst possible example of rules and regulations and devalues its land and all the neighboring lands.

What to do? I would suggest poisoning year after year. If the government waits long enough, someone's going to release a black-footed ferret and the Endangered Species Act would end any efforts to stop the prairie dogs from devastating this land. I might add that the Endangered Species Act should be rewritten to protect people from this sort of thing. The prairie dog is not endangered. They are prolific and with even coyotes, eagles and people who like to shoot them, they continue to multiply in all areas they inhabit.

In closing, it shouldn't take decades to control this problem. It is nothing but an example of government rules gone awry and the people who administer these lands can do everything wrong because there are too many rules and regulations. I hope you'll read my attachment. Mr. Bouret wrote a letter to Craig Thomas and it pretty much dissects some of the things that need to be done to this Endangered Species Act. And I thank you for the opportunity to testify here today.

[The statement of Nancy H. White may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.  
Harold Schultz.

**STATEMENT OF HAROLD SCHULTZ, BOARD MEMBER,  
WYOMING WILDLIFE FEDERATION**

Mr. SCHULTZ. Hello. My name is Harold Schultz. I'm a resident of Riverton, Wyoming, a property, a small businessman, a taxpayer, and a board member of the Wyoming Wildlife Federation. I am testifying in all of the above capacities but mostly as a member of the Federation.

The Wyoming Wildlife Federation is the state's oldest and largest conservation organization. While it is allied with the National Wildlife Federation, it is a local grassroots organization that speaks to wildlife and related issues as they pertain to Wyoming.

I wish to speak today on the concept of public natural resources and private property rights. Specifically, I am referring to grass, minerals, timber, and wildlife on public land. Are they public resources or are they private property? We're wondering where is this all going to go with this takings legislation, private property rights legislation and things like this.

In Wyoming, as elsewhere, these resources have been used before statehood. Often in early times, this use has equaled abuse. Thus, the need for regulation and regulatory agencies such as the Taylor Grazing Act as well as the creation of the BLM and the Forest Service. Historically, these agencies improved the condition of the forests and ranges. It also goes without saying these agencies made their fair share of mistakes. These mistakes usually happened when the agencies made decisions, often under political pressure, that usually favored individual users over the overall public good. Not for nothing was the BLM referred to as the Bureau of Livestock and Mining. The Forest Service, too, preferred to see itself as a manager of federally owned tree farms to the exclusion of other interests. Still, these agencies left the resource in better shape than they found it. Also, they have recently been giving more attention to holistically managing their public lands for considerations beyond just those of commodity production.

These land use agencies are realizing that recreation, wildlife and even aesthetics are important. This has been threatening to some ranchers and miners. A few have responded with threats of violence. In the last few years, at least one Federation employee and one board member have received death threats and/or been the recipient of various forms of intimidation. On a more positive note, the various users and interested parties involved with Federal lands have been able to on occasion craft land use plans where all users felt they were winners. An example of such planning are the coordinated management plans such as the one around Green Mountain in the central part of this state and Muddy Creek CRM south of Rawlins. I have been on both those CRM panels and I can say the process works.

However, in recent years some parties have felt that the public resources should be private property. In this state, there have been two lawsuits revolving around the concept that game animals, up until now regarded as belonging to the state, should become private property. Similarly, timber interests, at least some of them, seem to feel that lumber mills are entitled to—in other words, own—the right to a certain amount of lumber no matter what the condition of the forest or what other interests will be negatively impacted.

Certainly, ranchers feel, or at least some ranchers feel that when they have a grazing lease, they may be entitled to 100 percent of the grass within the lease. I have known ranchers on both sides of this issue myself and I have known some that feel that they own the right to deny physical access, as well. I can remember around Casper having a landowner post land for which I had a BLM map right there and could positively identify as public land. He had it posted as private land.

Most of these people have one thing in common, and let me make sure you understand that I'm not talking about all miners, all ranchers, and all lumber men. I'm talking about a few. But a few of them have basically got a case of the naked greeds and they're covering this greed with a fig leaf known as takings or private property rights. We feel that the bottom line on these issues is not an honest debate over constitutional issues or private property but instead is an attempt to promote certain private interests over public good.

Recently, there have been numerous stories of Federal bureaucracies doing all sorts of things. Some of them have been discussed here. We think some of them are true, some of them are exaggerations and some of them are somewhat false. But what we think their idea is is to have their proposals brought up that would either disband some government agencies or so weaken their power to regular that the effect would be to have no regulation at all. I understand that there is legislation in the U.S. Congress right now that would do that as far as BLM lands and the only affected interests would be the grazing lessee and, if I understand this right, that these Federal agencies, at least the BLM, would not be able to monitor the public range. I hope I have understood wrong on this, but this is what I have read.

Such actions could easily have the effect of debasing the public land to the point as it was at the early part of the century. Extreme use of one type of activity could easily be detrimental to other users of the land, and I guess what I want to emphasize here is again that concept of balance. We can have some win/win situations or we can have win/lose situations, but that need for balance is always going to be there.

I see I'm out of time but I do want to say that we believe also that public lands should stay public lands and they should not be privatized or given to the states to be so privatized. I understand that there's legislation being crafted or has been crafted to turn it over to the states. We feel this is probably a way to get it sold off to the private interests since we don't know how the state could manage all this land in the first place. All of the above implies a certain amount of necessary government regulation and it also implies a certain amount of conflict. This need not be feared if it is civil and reasoned because such conflict is usually beneficial and is what makes democracy work. But we believe that these private property takings and state rights should not be used as a way for a few people to take more of the public resources than they should be reasonably entitled to. Thank you.

[The statement of Harold E. Schultz may be found at end of hearing.]

Mr. SHADEGG. I believe, as Mr. Metcalf pointed out, the challenge before us is indeed striking that balance.

Mr. Ken Hamilton.

**STATEMENT OF KEN HAMILTON, ADMINISTRATIVE ASSISTANT  
WITH THE WYOMING FARM BUREAU FEDERATION**

Mr. HAMILTON. Thank you, members of the committee. I appreciate the opportunity to be here to discuss this very important issue. My name is Ken Hamilton and I'm the Administrative Assistant with the Wyoming Farm Bureau Federation. We recently celebrated the 4th of July here in Wyoming and the rest of the nation, and I think it's important to go back and look at the conditions that this country was in prior to gaining independence.

At the time of our forefathers, the king had ultimate power. The government had ultimate power. They could require private citizens to house soldiers in their homes. They could require the citizens to feed those soldiers, and they could take the private property of these citizens if they so desired. After our forefathers fought the Revolutionary War and established the Constitution, they decided that they needed to put some limits on government. They decided they needed to put some Constitution guarantees in there for private property landowners.

But over the years, with the help of ever-expanding bureaucracy and concurrence with members of Congress and the judicial system, we find citizens of Wyoming required to provide free forage to a federally protected horse. We find citizens of Wyoming required to provide free livestock to a federally protected bear. We find citizens of Wyoming required to provide free grain to federally protected migratory waterfowl. I submit that there's not a lot of difference between these instances and what our forefathers fought against.

Wyoming has the dubious distinction of being the headwaters of several numerous river systems in the United States. I recently spent two days in Gering, Nebraska, and the whole time we were there we discussed nothing but how we were going to provide water for a federally protected bird. Now, in a year like this, there's not a lot of concern about water. In fact, at the time we were discussing this, the birds' habitat was under two feet of water. But in a year like last year, the only way to provide them water is to take from irrigators in Wyoming and Nebraska and others. I think that another thing that's instructive about this whole process is I spent two days doing this as well as other irrigators. The amount of time that we spent just going to meetings to look at government regulations and government rules is enormous and it takes away from these people's livelihood. It takes away from their ability to earn a living. They could be out working their ranches or their farms if they weren't in various hearings and meetings and things like that.

The wetlands issue has already been touched on, but I do know when they first established the wetlands provisions, they did a lot of infrared imaging in Wyoming and we found landowners that had to go in to the Federal Government and prove that the wetland the Federal Government said they had was actually the top of a hill with discarded machinery on it. One individual said that it was an old abandoned house foundation, and these individuals had to take

time away from their schedules to go in and prove that they didn't have wetlands.

I think probably this year there's another instance that I just learned of yesterday where an individual who lived next to a natural lake that had been dry for the last 10 or 12 years suddenly found his hay meadows in a wetland. He was told he can't cut the hay because of it being a wetland.

I recently finished commenting on Forest Service regulations dealing with ecosystem management and by all accounts, ecosystem management, in order to be successful, it has to cross jurisdictional boundaries. But one thing in the narrative I think is particularly instructive of the way that our neighbor, the Forest Service, is looking at this. In the narrative under the heading Civil Justice Reform Act, it says, "This proposed rule has been reviewed under Executive Order 12778 Civil Justice Reform. If this proposed rule were adopted: [1] all state and local laws and regulations that are in conflict with this proposed rule or which would impede its full implementation would be preempted." What kind of an image is that for adjacent landowners? I think that there's great concern out there amongst landowners about impacts of private land by Federal rules.

What are some of the solutions? I think we need to push through the takings legislation to support that we protect private property in this nation. I think we need to amend the Endangered Species Act to take private property rights into consideration. I think it's important to note that a constitutional guarantee against taking of private property without just compensation has no legislation to help protect it. But we do have the Natural Environmental Policy Act that requires extensive, extensive reviews of any major Federal action for their impact on the environment. I don't think that that could be any less important to protect property and the impacts Federal regulations have on private property than it is to look at the environmental consequences.

And thank you. I see my time is out. I thank you, members of the committee, for this opportunity to be here today.

[The statement of Ken Hamilton may be found at end of hearing.]

Mr. SHADEGG. Thank you very much. We'll begin the questioning with Mrs. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman.

I would like to ask Mr. Rule. You said that you can't touch 300 acres of your land because it's a wetlands. Do you still have to pay taxes on those 300 acres?

Mr. RULE. Yes, I do, Mrs. Cubin.

Mrs. CUBIN. Is anyone else on the panel in that same situation? That seems to be one of the big things that I've run into is that when you own some of this property, you have the right to pay taxes but none other. It doesn't seem fair to me.

During this debate, it seems like in the eyes of the opponents to the bill to protect private property that the argument seems to be whether or not we should obey the Constitution and compensate for private property takings or whether we should protect the environment. It seems like the opponents don't think we can do both. I

would like to ask Mrs. White, how do you rate the importance of a clean environment to your life and the life of your family?

Ms. WHITE. I think we can do both. There's no reason to say you're going to do one or the other. We can protect the environment, but we can also protect the landowner. It's very simple if it's done right and the right people are in jurisdiction.

Mrs. CUBIN. Dr. Cameron, what would your response be to that?

Dr. CAMERON. Well, I think there are tens of thousands of points of light out in this country. I think overwhelmingly landowners cherish the environment and the species that inhabit that environment. I think heavy handedness leads to a snuffing of those points of light and in the last 10 years, people who would have been co-operators have been turned into resistors. I think this is very, very sad and I hope we can reverse that. Certainly, the word is out and we have found in our management group in our part of Montana that we all concur that we want our children to see the land much as we're seeing it today, improved wherever possible, breathing the cleanest air possible, and at the same time living a prosperous existence. It can be done. We have to quit posturing and we have to quit deciding who has absolute control. We have to rely on the good will of people and I think we'll make progress.

Mrs. CUBIN. Thank you. My last question is for Mr. Schultz. You described people who want to be compensated for their property takings as naked greed and I wonder, do you see naked greed here in the panel or would you consider a person maybe trying to make an honest living—I mean if you, for example, had a ranch and you tried to make an honest living and provide for your family and still have land that you can't use so that you can't produce it and face the possibility of bankruptcy as we've heard so many times up here, do you consider that naked greed or do you consider that being a good family man trying to take care of his family?

Mr. SCHULTZ. Mrs. Cubin, I have a lot of ranchers who are my friends and the people I'm describing there are in a minority, I think. Most of the ranchers I know and have talked to—not all, but most of them—are trying to make a living and are very sensitive to the people who want to take care of the land, water, wildlife and things like this. I thought I—I hoped I made it clear in my presentation. If I didn't, I'll make it clear now. We're looking at a minority of people but they seem to be using this type of thing to further their own needs and yes, there are some people out there who are very greedy and who are trying to get more than what we believe is their fair share of the public resource.

Mrs. CUBIN. Thank you. My last question, and I'll just make it real quick and I hope this response will be, too. You heard Mrs. White and Dr. Cameron say that they think that we can provide for protecting the environment and also compensate landowners for takings. Would you agree or disagree with their opinion on that?

Mr. SCHULTZ. Are you referring to takings on their private land? Is that what you're referring to? On their deeded land?

Mrs. CUBIN. Yes.

Mr. SCHULTZ. I would like to hope we could. I don't know if there's money available, but I think that if we start now and start talking, then I think that that's a very real possibility.

Mrs. CUBIN. Well, that's why we're here. This is what we're hoping to accomplish. Thank you very much.

Mr. SHADEGG. Mrs. Chenoweth.

Mrs. CHENOWETH. Mr. Chairman and Mr. Schultz, I'd like to continue that line of questioning. You indicate that you are a property owner.

Mr. SCHULTZ. Yes, I own a home in Riverton, Wyoming.

Mrs. CHENOWETH. You have a home.

Mr. SCHULTZ. Yes.

Mrs. CHENOWETH. And you own a home and you have a small business?

Mr. SCHULTZ. Yes. I am a counselor/therapist in private practice.

Mrs. CHENOWETH. How long have you been a therapist?

Mr. SCHULTZ. What is it? Fifteen years now, somewhere around there.

Mrs. CHENOWETH. How would you feel about the government coming in and saying that you could only work half the time and see half the patients? Would you be happy about seeing half of your clientele?

Mr. SCHULTZ. OK. Let me answer this by saying this. Recently, the state government ran low of funds and they could not put out as many contracts, the Department of Family Service couldn't put out as many contracts to people like myself and so a certain amount of my income was taken away by government action. I have to say that I was disappointed but I also have to look at it in another light. Do I have a right to that amount of business or do I have to look at there are some other people and some other ideas, too, and the fact that there's not enough money to go around for everything. So I have to balance what I like for my own personal self with the public good, too.

Mrs. CHENOWETH. So what percent of your business is dependent upon taste contracts or taxpayer-funded programs?

Mr. SCHULTZ. Right now, I only have one contract. Ninety nine percent of mine is nongovernmental at this point.

Mrs. CHENOWETH. So you've experienced maybe one percent drop because of this?

Mr. SCHULTZ. No. Two years ago, about a third of my money was coming from state contracts, so what happened was that I experienced a very substantial income drop.

Mrs. CHENOWETH. See, what we're talking about here is not only people's businesses being interrupted but also taking of their private property like your home and I, too, was taken with your comment. "Most of these people have only one thing in common, mainly greed." And you were talking about ranchers and timbering people and I just want to share with you the fact that I honestly believe, too, that most of our ranchers and timber people know that when we're good to the earth, the earth is good back to us and we are supposed to be good stewards of the earth. You mentioned in your testimony that Wyoming Wildlife Federation is affiliated with the National Wildlife Federation.

Mr. SCHULTZ. Yes.

Mrs. CHENOWETH. And do you realize that in 1992 just in that year, the National Wildlife Federation took in for its annual income

\$41,716,044. That's not a—for change. So what I'm saying is that it's a pretty rich organization and——

Mr. SCHULTZ. Could I respond to that, please?

Mrs. CHENOWETH. We're dealing with people whose incomes are far, far, far less than that or organizations whose income nationally even are far less than that.

Mr. SCHULTZ. I'd like to make the point that we're not the National Wildlife Federation. We don't get any moneys from them and that all of our funding is from our members and supporters and things like that who are in Wyoming. We're not a tremendously rich—believe me, I'm on the board of directors. So I'm not sure what you're trying to say. I'm not sure of your point, but we're not that rich.

Mrs. CHENOWETH. I was only referring to your testimony where you say you're affiliated with the National Wildlife Federation.

Thank you, Mr. Chairman

Mr. CHADEGG. Mr. Schultz, briefly, are you a part or is your organization a part of the Wyoming Conservation Network or is that a separate organization?

Mr. SCHULTZ. Now you've got me on that one, sir. I think we are, but don't quote me on that. OK. I'd have to check and see if we are or not.

Mr. CHADEGG. I only raise it because the ad that Senator Wallop referred to and that I referred to which has clearly factual inaccuracies in it and blatant lies, to use his word, was sponsored by the Wyoming Conservation Network and I just wondered if your group is a part of it or contributes to their funding, I hope you'll try to help educate them as to those kinds of errors.

Dr. Cameron, your testimony was fascinating. I would love to be able to question you at length and learn more about it, but I won't except to ask you quickly to explain the ecosystem management demonstrated in Kruger Park and how that would help Yellowstone, just if you could briefly.

Dr. CAMERON. Yes. One of the mandates and the thinking of the conservation movement is the maintenance of biodiversity and in Kruger National Park, they view that large area as a complex ecosystem and they systematically cull; they systematically burn; they systematically provide in one way or another, primarily through fire as the intervening force, for those species that depend on these intrusions for their existence. So they've kept it a dynamic system whereas in Yellowstone Park we stopped managing things in 1967 allowing the bison and the elk to expand to unbelievable numbers at the great expense to biodiversity, and I think this is a case of government gone awry, by accepting a policy which is unrealistic in these days and probably always was unrealistic. We have to monitor what's going on and if we want the ranchers to maintain biodiversity, I think we should set an example in the park and start thinking about the riparian zones along the Yellowstone River and start thinking about other aspects of habitat management, not just this blind-eyed, let it be philosophy. Thank you.

Mr. SHADEGG. Thank you very much. I also note that you make some point about "We must put money into carrots, not sticks." I am working on a draft rewrite of the Endangered Species Act which focuses specifically on carrots with the idea of if we can en-

courage people to use their land properly as you clearly use yours, we can in fact create habitat, not create environment in which people want not to have species found on their land because they're afraid of a government that'll come in and take their rights away.

Dr. CAMERON. Exactly. Carrots don't have to be monetary. Just removing the threats, for one thing, will go a long ways, I think.

Mr. SHADEGG. I'd like to thank each and every one of you very much for your thoughtful testimony. It has been helpful to me, as I'm sure it has been to the full panel, and ask the next panel to come forward. They are Don Meike, I'm not sure how you pronounce that, Lois Herbst, Marion Loomis, and Stephanie Kessler. For those of you who are in a subsequent panel, I've already sent a note to one member of that panel who asked whether or not you would be allowed to testify. Come heck or high water, we're going to let everyone who is a scheduled witness testify, so please stick around. You will get your chance.

Mr. SHADEGG. With that, sir, how do you pronounce your last name.

Mr. MEIKE. You were correct. Don Meike.

Mr. SHADEGG. Very well.

Mr. MEIKE. I'm a board member of the Wyoming Heritage Society.

Mr. SHADEGG. You need to grab the microphone so that I can hear you, but I want the people out behind you to be able to hear you. Thank you, sir.

#### **STATEMENT OF DON MEIKE, BOARD MEMBER, WYOMING HERITAGE SOCIETY**

Mr. MEIKE. My name is Don Meike and I'm a board member of the Wyoming Heritage Society and the Wyoming Heritage Foundation. Our organization was founded in 1979 in order to promote Wyoming's economy. As Wyoming's largest and only broad-based business organization, the Wyoming Heritage Society focuses on state and regional economic problems, promotes the development of the natural resources and the multiple use of Federal lands, supports responsible environmental policies, works on economic development opportunities for the state and represents the business point of view on regulatory and tax policies.

Our nation has achieved its world status through production and sound utilization of our wonderful labor and natural resource base. This has been done in a private enterprise atmosphere, dependent upon private property rights and the inherent protection of personal property that only private ownership fosters. We are risk takers, knowing that even with failure we learn not to make the same mistake again. Our responsibility, especially here in the west, are not to kill the goose that lays the golden egg. In our case, that certainly means sound resource management as we use our natural resources in a sound and safe manner.

Our government in the past several decades has become more responsive to the possible infractions on good management that private enterprises come in or even could come in. It is here that the numerous good intentions of the rulemakers get out of hand. Over-regulation, especially by the Federal Government, is becoming

more and more common and definitely more damaging to private property rights we all hold so dear.

A case in point occurred over two years ago. The Buffalo Resource District of the BLM in updating their resource management plan listed essentially every creek in the area that run through any BLM and as eligible for wild and scenic river designation. No one disputed that they were all beautiful and that the portions of private ownership were just as scenic as that of the BLM areas. These streams are the life blood of Wyoming. Private owners are not about to desecrate them on either private or public lands. The need for a wild and scenic designation was contrary to the wishes of the citizens of the county and even an insult to our resource management.

Wild and scenic designations, however, would prohibit further development of water resources that are connected with these streams. Damns for either diversion or storage could not be built. Fences and other livestock and wildlife management practices would be restricted. Local management that had made our state so desirable to others would be transferred to those who had already wrecked their own playground. The greatest concern of many citizens protesting this designation is definitely a taking of private property. Essentially no one other than BLM employees made any attempt to support positive action. Nonetheless, the BLM persisted and carried on to the final stages of nomination. Only with continued effort on the part of the citizens of Johnson County were we able to put the final decision on hold. Apparently the plan is hidden in the back rooms prepared to pounce if we ever let our guard down. It has taken two years of protest, meetings, letters and other concerned actions to slow this process down.

People in our area are not about to let our scenic landscape be destroyed. Our concern is that too many people is the greatest threat to our wild and scenic rivers and open places. A Federal designation of that nature will not protect anything but would only encourage over-usage and desecration. Wild and scenic river sounds good but in reality, it's just another of the many infringements on the property rights of the west. We need to be able to hold the decisionmakers responsible for their actions. Overzealous, whether they be legislators, bureaucrats, judges or juries or anywhere in between, need to be held accountable for their actions if they infringe unduly upon the rights of others. Our Bill of Rights needs to be accompanied by a bill of responsibilities. This is a moral obligation that must be implemented, not by more regulations but by holding accountable those who infringe upon the rights of others. An effort in this area should be appreciated by the citizens of our state and nation.

[The statement of Don Meike may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.

Lois Herbst.

#### **STATEMENT OF LOIS HERBST, PARTNER, HERBST LAZY TY CATTLE CO., SHOSHONI, WYOMING**

Ms. HERBST. The red light means you're done when it goes out? Thank you.

Mr. Chairman, I'd like to address Barbara Cubin a moment. I had said in this paper that I was representing myself speaking today but the president of the Stock Growers, Stan Flitner, called and asked me to apologize to you for the fact that he couldn't be here and to help Dave Fuller represent the Stock Growers on these issues.

Mrs. CHENOWETH. Thank you.

Ms. HERBST. And we do welcome all of you here and I hope I personally meet you later, Representative Chenoweth.

I gave you this written report. I would just like to let you know that we have gone through a takings which was in the public interest and that was for an irrigation, flood control, recreation, power generating type of reservoir. But they also took our minerals when they condemned our land for that reservoir. They gave us preferential grazing rights and the first thing you had to do was give them back the paper that gave you the rights, and then they would activate your grazing lease. They continued to give us preferential grazing rights for almost 50 years. Now they're telling us, though, that they will manage the grazing, because the Bureau of Reclamation no longer has anything else to do really, so they're going to manage resources, wildlife, recreation and so forth, on the take land that was involved.

One of the things that has developed on this take land where I drew the point and started—I wasn't involved in the first of this and we recognize the good of it, but the Interstate Commerce Commission had a petition from a railroad to abandon the railroad and if you abandon a railroad and seek a responsible person, you can bank your railroad right of way without consulting the people and develop a recreational trail without consulting the owners of the simple fee interest underlying that right of way. In our case, they did consult, though, with the local tribes and the tribes told them no, we don't want a recreational trail. You can abandon that. But they were fully expecting the salvage value also and they did not get the salvage value. The county let the railroad keep the salvage value. But the tribes have told them, "We do not want this recreational trail," and they own most of the land in the 20 some miles of trail. But there's also, I think, 42 private owners and we have been practically ignored. The county said that they did hold hearings and so forth but we still essentially were ignored.

But a trail is one thing, but we knew what would happen. They don't stay on the trail. They're immediately off the trail trespassing private lands and tribal lands. They don't like the fact that the railroads used to allow us to take a fence to the railroad and then cattle would go under. They had crossings where our cattle could go under. They want to use all of the trail which means that the fence would be out to the side. We can no longer put our cattle under there. But that's a matter of small consequence because the Bureau has cut us down so little on the number of cattle we can run that it is an economic impact to our ranching unit. We have to go out and purchase other ranch to replace the use of the 4,000 acres of bottom land that we had used for almost 50 years.

They have said we have recourse under the Tucker Act. Yes, we do. But being paid isn't the same as keeping title to land. We prefer to keep title to that land. They have offered to pay the taxes

once. I didn't realize they're required to do it, and now we will see that they pay the taxes because the people are claiming they own the land. Now, is my time up? Thank you. It's been great having you.

Mr. SHADEGG. You may finish. You may conclude.

Ms. HERBST. Well, I wanted to tell you that one of the main reasons that I object to this also is that they plan on and have already sold easements under that—through that right of way. They think it's a big money maker for the trail users groups. The landowners aren't even consulted. They said that's the way it was when it was a railroad. Well, it is no longer a railroad except they consider it that under that National Trails Act and the abandonment process. But we are liable. I know any lawyer will sue us when the accident takes place on our portion. We will be sued just as the county's been sued. They were found not liable but they had to stand the expense of the suit. Thank you.

[The statement of Lois G. Herbst may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.

Marion Loomis.

#### STATEMENT OF MARION LOOMIS, WYOMING MINING ASSOCIATION, CHEYENNE, WYOMING

Mr. LOOMIS. Mr. Chairman, Congresswoman Cubin, members of the committee, thank you for coming and thank you for inviting Wyoming Mining Association. WMA represents all of the major mining companies in Wyoming. We lead the Nation in production of bentonite, coal, soda and uranium. So we're a significant player in the United States.

It's truly an honor for us to have you here, and your concern regarding the right of landowners to use their land. You need to be really commended on that. Maintaining the use of the private property is certainly a strong concern of the mining industry.

In the interest of time, I'm going to discuss three areas very briefly that WMA feels could constitute a limited use of private property. Those include development of coal in alluvial valleys, development of wetlands and mining sites and potential development of mining claims.

You've already heard a couple of references to the Whitney Benefits case here in Wyoming. That was legislation that resulted from the passage from SMCRA, the Surface Mining Control Reclamation Act in 1977 which precluded of coal here in Sheridan County. That resulted in a takings case, a \$60 million judgment which ultimately ended up in a \$200 million payment by the Federal Government to the owners of interest. We're very concerned that that's going to continue. There are a number of other areas with alluvial valley floors being identified. If it meets the conditions in SMCRA, development of those lands would be precluded.

I might mention that at the time that mine was operating, it was about 60 percent of the assessed valuation of this country. Over 50 percent of the total taxes paid to this county came from that one mining operation. Because of that takings, new development could not go on. Future development is precluded because most of the coal located in the area is contained or controlled by the low cost

coal in the alluvial valley. So without the coal in the alluvial valley, which we have proven that we can reclaim, just here north of Sheridan, there's excellent reclamation of an alluvial valley. So the preclusion of the act has stopped development of that mine which was 50 percent of this county's tax base—or 60 percent of the tax base and 50 percent of the total taxes.

We can develop additional areas. We can reclaim the area and we would hope that as you look at legislation down the road, conditions to allow development when reclamation is feasible, proven reclamation is feasible would be allowed in your legislation.

Development of wetlands. We're very concerned right now that the Corps of Engineers is requiring us to replace any wetlands we encounter with a temporary wetland. Our mining plans require that once the area is reclaimed, we have to reclaim it with permanent wetlands. We're very concerned we're going to be caught in a catch 22 where our mining permit says we have to tear out all of the sediment control structures which, if left there for 20 years, could become a wetland. Our mining plan will say we have to tear that out. The other agency of Federal Government will say, no, it's a wetland. You have to protect it, and the operations are going to be caught in the middle.

We compliment you on looking at wetlands issues in the coming months and hope that reasonable common sense will have some bearing in the development of that legislation.

Mining claims. There are many patented and unpatented mining claims in Wyoming and WMA is very concerned that these legitimate property rights might preclude it from development. We're very supportive of making needed changes to the mining law and making them this year. But we do urge Congress to take special care to protect those private property rights. The 1987 Mining Law and a very large body of administrative and case law interpreting the statute are the underpinning of an active and self-sufficient mining industry.

Recently, some members of Congress have identified locatable minerals as a source of government revenue. They would impose a royalty on minerals extracted under the Mining Law and they would impose a royalty retroactively to claims that were validated by discovery but that are not yet through the patent process. The mining industry has acquiesced in the demand for a reasonable royalty. We recognize the inevitability of it, but we have not agreed to any retroactive application of royalty. It is indisputable that a valid, unpatented mining claim is property. While we acknowledge that the Federal Government can impose regulation such as recording and mandate environmental burdens, we believe that imposition of a royalty being proposed would be a curtailment of legitimate investment-backed expectations rising to the level of a compensable taking. The patent moratorium proposed in appropriation language we feel is unfair and should be terminated and we would hope that when you work on the mining law that valid and existing rights be grandfathered in transition language in any new mining law.

Thank you for the opportunity to comment and, once again, thanks for coming to Wyoming.

[The statement of Marion Loomis may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.  
Stephanie Kessler.

### **STATEMENT OF STEPHANIE KESSLER, LEGISLATIVE AND ISSUES DIRECTOR, WYOMING OUTDOOR COUNCIL**

Ms. KESSLER. Mr. Chairman and members of the task force, my name is Stephanie Kessler. Thank you for having me here today. I represent the Wyoming Outdoor Council. I'm going to speak very fast.

I have been dealing with legislative issues regarding takings and property rights for over five years in the State of Wyoming. This is an issue that relates across the board to both Federal, state and local governments because the takings law that you passed four months ago makes a basic major philosophical and approach shift in public policy and you can compare all of these issues across governments. In each of the five years in our Wyoming legislature, we have rejected the concept of compensatory takings and most recently and firmly rejected any legislative attempt to expand the definition of a constitutional takings.

Sadly, both of these features are in the bill you passed four months ago. Wyoming rejected this legislation because they see it as a taxpayer's nightmare, a budget buster that generates endless new litigation, uncountable cost to state government, new layers of bureaucracy and undermines all sorts of protections for the public. In addition, in five years of testimony on takings in Wyoming in our legislature, proponents never identified one specific example of a state regulation that constituted takings. Instead, our state affirmed that the Constitution is working and in no way did we try to tamper with that law.

This is an issue of balance. As Professor Art Gaudio, Dean of the University of Wyoming College of Law states, "The sum total of all rights, privileges, powers, and immunities a person has in land does not give the landowner the absolute right to do anything he or she may desire on the land. Property owners are not only private persons but also members of society. As such, they owe duties to and receive benefits from that society."

We've heard about the Whitney Benefits taking suit. This is a case where the Constitution shows that it works. It's a unique case with an appropriate result. After a detailed examination, the courts found that a total 100 percent taking of an entire property's economic use had occurred and it awarded compensation. The takings provisions of HR 9 which you passed, however, are a radical departure from this law applied to the Whitney case and from our Constitution. It mandates payments for government actions that are now not constitutional takings. It makes payments when only a small fraction of the land is impacted and even goes so far as to require payment when no actual loss has happened. It also could require Federal land acquisition. This is a flawed caricature of constitutional law, that a private property owner has the absolute right to the greatest possible profit, regardless of consequences of the use on other individuals or the public generally.

The Whitney case did meet the constitutional definition and it also did cost our government in total what I hear is \$290 million, just one case. Now imagine opening up the government's coffers for all kinds of speculative claims, as I believe HR 9 sanctions. It is a lawyer's field day. The fiscal impacts are unimaginable and we believe what you've created is "make a claim and we'll make a deal" bill. It's not a "look before you leap" bill.

Let's get on to some of the evidence. First of all, I've told you what we discovered in Wyoming regarding the state takings. What about Federal laws? Your bill targets two programs, wetlands and Endangered Species Act. In Wyoming in the last five years, the U.S. Fish and Wildlife Service has not blocked any action on private land due to the Act. They have conducted 1,751 consultations and issued 14 jeopardy decisions representing only .8 percent of all cases. All of those 14 cases regarded the depletion of water to the Colorado River system which can jeopardize four endangered fish downstream. In every one of those cases, a reasonable and prudent easy alternative worked out and each party was able to proceed.

Regarding the wetlands permit, there has never been a case in Wyoming where the courts found a real estate takings. In the last 20 years, 3,322 permits have been issued and only eight denied. That represents two-tenths of one percent of all permitting. In most of those cases, the landowners first broke the law by illegally filling without a permit. The majority were cases where the illegal fill was shown to alter river hydraulics or stream quality so as to harm downstream property owners or fisheries. In all cases, the agency provided alternatives and opportunities to redesign structures so as to be more stable, less damaging, or to redesign plans to achieve the same desired result. Given this history, what is the problem?

I'm going to close here. This record demonstrates a conservative approach and willingness to work with the public and work out alternatives. This is not to say, however, that all Federal land management agencies are perfect. Problems arise, conflicts occur, especially with landowners, and no doubt regulations do need reform. But the specific problem must be clearly identified and documented. If a rule or regulation can be modified to balance the landowners' concerns and the larger public needs, then that mechanism should be pursued. We are not against fixing the problem but your legislation and takings legislation like what you've passed is a sweeping one size fits all fiscal train wreck that creates a much bigger problem. Where is your documentation of the need for such a sweeping entitlement program and how can such a budget buster be justified in today's climate of fiscal restraint?

I urge you instead to listen to what we in Wyoming have already done. Go back and scrap HR 9, respect the Constitution and the 100 years of case law we have with it, and address specific documented problems and do not give us another Federal entitlement program for special interests that will be borne on the backs of the rest of the taxpayers. Thank you.

[The statement of Stephanie Kessler may be found at end of hearing.]

Mr. SHADEGG. Again I want to thank each of you and we'll begin the questioning with Congressman Metcalf.

Mr. METCALF. Thank you, Mr. Chairman. In the interest of time—I looked at my watch—I think I'll forego the questions for this panel.

Mr. SHADEGG. All right. Congresswoman Chenoweth.

Mrs. CHENOWETH. Mr. Chairman, in the interest of time, I'll forego my questioning.

Mr. SHADEGG. Mrs. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman. I just have one question for Lois. In your written testimony, I was interested that you stated you were from Slovenia, Yugoslavia, and I'm sure your ancestors saw their rights being eroded under the Slavic government and they were glad to come to America. The difference between our form of government and their form of government is that our form of government is based on private property rights and under a socialistic government, they believe that private property rights should be given up for the good of all the people. That's the difference between our government and socialism.

So the question I want to ask you, I guess—I just wanted to point out that in your testimony since the people out here didn't have the opportunity to read it as I did. The question I wanted to ask you is the prior panel felt that we can protect our environment and still compensate people when their land or land use is taken from them. Would you agree with that, Lois?

Ms. HERBST. I think you have to be very careful about regulations that really are for a taking purpose period. I think many of the regulations coming out of Congress in the past few years and the interpretations that have been given by the United States Supreme Court has been only in the interest of developing strong government in Washington. We have been very encouraged to see that this Congress is working to take the strong government from Washington, give it back to the people where it belongs. I am sorry that I missed out on the type of education that people had before 1918 when you were studying the Constitution, when we were learning civics, how government functions instead of social things.

It's my husband's family who was from Austria and then Slovenia, but I do feel a need to care for what they tried to develop in this country. We have the best country in the world and the best of everything and it's up to all of us to see that it stays that way.

Mrs. CUBIN. I agree with you. Thank you. I have nothing further of the panel.

Mr. SHADEGG. I won't resist the temptation. I want to ask a couple of questions of Mrs. Kessler. I thought your testimony was very thoughtful but at one point you asked us to go find specific examples and to look to those. I wonder if you were present and able to hear Mr. Tom Rule in his testimony?

Ms. KESSLER. Mr. Rule's testimony—let's see, I have notes here—was regarding his 300 acres. Right? Yes. Swamp wetland. No. But he did mention—I heard that and I don't know the details on that but he happened to mention Mr. Chandler Peter, who is the individual that provided me from the Corps of Engineers with the fact sheet and I have copies for all of you of 20 years of statistics of all permits denied and at the very back, long several paragraph descriptions of each of those cases so that you can see. So I imagine that either the data here was through early this year, March, 1995.

Probably it's either not settled or it's not in there so the point though, I think, is that what I've learned from reading the data from the agencies is that there are two sides to every story and that I think your job here should be to do fact finding and actually to flesh out all of the facts and hear everything.

I also have for you a document here. We heard a lot of out-of-state stories about endangered species. Now, I didn't come here prepared to address those, but this information here will tell you different facts or put a different spin on some of the stories that you've heard and will show that there are two sides and you need to look at those two sides. And I will make a copy of this for you.

Mr. SHADEGG. I thank you very much for the materials you've brought documenting those cases and for that other sheet. I believe, if the other sheet is the one I've seen, I've read it and seen that it does contain counter-arguments. I also have heard Senator Wallop make a presentation about the facts in the other side of the story on that particular sheet, if it's the one I've seen. So let's deal with a hypothetical. Let's assume that there is a fact like Mr. Rule's, a circumstance where he has a piece of property and water continues to accumulate because he's not allowed to drain a ditch. It is, in fact, let's assume just hypothetically because I believe certainly cases such as this do occur in America, where ultimately the amount of land covered and declared a wetland grows and grows and let's assume the Fish and Wildlife Service determines that it's an irrigated created wetland which would allow him to drain it but it is rather a natural wetland that happens to keep growing and growing and growing, and let's assume hypothetically that we have decided as a nation that it's important to protect that wetland so that there will be wetlands for wildlife and waterfowl to grow and breed in. Do you think that under the Constitution ultimately there would be a taking which would entitle the owner of such land to compensation?

Ms. KESSLER. I actually am not a constitutional attorney but I do have for you the paper that I have cited by the Dean of the University of Wyoming College of Law on regulatory takings and this paper clearly indicates that the Supreme Court has shown, No. 1, that you can not take a parcel of land and divide it up and segment it and then assign constitutional takings to just one segment nor can you—to go as far as 20 percent of the assessment seems to go—it doesn't seem, it goes far beyond any constitutional decision. So I would say that you'd have to look at the specific circumstances of that case and look at whether it was a taking of, you know, the vast, vast majority of the economic use of that property and that's why I think the Wyoming legislature decided that the courts are best suited to do that case by case analysis and look at that, so I can't generalize.

Mr. SHADEGG. The problem I have with that is that until we passed the 1964 Civil Rights Act, black people in America and brown people in America were in the same position. They had a right under the 14th Amendment to the Constitution to equal protection under the law but they had no remedy. They had nowhere to go and so they were put in a position where if in fact they were ordered to go, as some of them were, and sit in the back of the bus, their remedy was to file a lawsuit and wait for the courts to resolve

it. The clear language of the 5th Amendment says, "No property shall be taken without just compensation." It doesn't say no property in excess of 20 percent of the value of one's property shall be taken without just compensation. And so, quite frankly, I see the 20 percent floor that is written there as one which says, well, we can take 18 or 19 percent of your property without compensation. If we cross the line of 20 percent of the value of your property, then we have to compensate you. So I see it as drawing a floor which is not below the Constitution but way above what the Constitution would require.

My difficulty with it—and I apologize because we can't carry this on because we have to get on to other witnesses—is if in fact we were talking about taking 20 percent of home—let's say you have a 100 square foot home and we discover that it's inhabited by an endangered species but only 20 percent of it or 18 percent of it is inhabited by that species. You will simply have to give it up. I don't think you would sit idly by and say, well, that's wonderful, or if 20 percent of your land needed to be taken to put in a freeway, I don't think you would simply say, well, that's fine, it's only 20 percent.

And so I share your concern. I think it's important to try to look at these situations and get the facts. I just think that under the 5th Amendment of the Constitution we do in fact need to enact some statutes to clarify these rights and, quite frankly, I see the rule where it says we can take up to 20 percent but as long as we take less than 20 percent, we owe you nothing as not going beyond the Constitution but, as a matter of fact, as giving people who own private property something less than the Constitution itself actually says they're entitled to.

Ms. KESSLER. Can I respond just a little bit?

Mr. SHADEGG. Sure.

Ms. KESSLER. First of all, I'd like to clarify. The Constitution and almost all case law has shown that it has to be 100 percent takings, not even close to a 20 percent.

Mr. SHADEGG. Well, I want to talk to you about the words of the Constitution. The words of the Constitution says, No property, not some property. It says "No property shall be taken without just compensation." What they are talking about is 100 percent of the property which, in fact, affected. All we've said is, yes, 100 percent of that 20 percent has to be taken but once you reach that, you're entitled to compensation. The case law in this area has said that 100 percent of the value has to be taken of some portion of property. What we've said is it's going to be 100 percent up to a chunk which equals 20 percent of all their property.

It really goes back to the point I made about your land. If you live on an acre of land and we're going to take 20 percent of that acre of land to build a road, we have to compensate you. If we're going to take one percent of your land to build the road, we have to compensate you.

Ms. KESSLER. That's a physical invasion which is an actual real property taking which is different than a regulatory taking.

Mr. SHADEGG. Well, if you ask Mr. Rule, if you were to come back up here and Mr. Rule were to say to you there is a physical invasion of his property by this wetland, he can not farm it, he can't go on, it is gone.

Ms. KESSLER. What I'm trying to point out is that what you have in the bill that you passed does not fit 100 years of the Supreme Court and their expertise in interpreting the very clause of the Constitution that you have quoted. In an ideal perfect world, it would be wonderful if the government could compensate for every economic loss of every regulation but unfortunately, we live in a society where we have to be members and recognize that there are also societal goods that we respect. Now, I think one of the best examples of this with wetlands is what happened with the Mississippi flooding whereas wetlands, if they had been preserved, would have actually protected hundreds and thousands and millions of dollars of private property if we had actually had more wetlands along that riverway.

So there is no quick and sweeping answer to this and I would much more trust the courts to look at every individual case and assess the fairness of the takings than to arbitrate. And also, I want—

Mr. SHADEGG. I'm sorry. We really are out of time, but let me just ask you. Would you trust the courts when they said that separate but equal was the appropriate treatment of different races because for a while in America that's what the court said and if we simply sit back and say what the courts say is the law is the law and that Congress can't change it, we never would have passed the 1964 Civil Rights Act—

Ms. KESSLER. I agree that Congress can change the law but I want to point out to you the contradiction in the changes you have made to current case law.

Mr. SHADEGG. Let me call the next panel. Mr. David Fuller, Mr. Brad Palm, Mr. Bryce Reece, Chas Kane, Mark Gordon and Dan Scott. Again, I want to thank you all for coming. Let's begin, Mr. Fuller, with you.

#### **STATEMENT OF DAVID FULLER, BIGHORN FOREST GRAZING PERMITTEES ASSOCIATION, SHERIDAN, WYOMING**

Mr. FULLER. Thank you, Mr. Chairman. I am David Fuller, representing the Big Horn Forest Grazing Permittees Association. I'm a retired cattle rancher and was a Big Horn Forest permittee for 35 years. The Grazing Permittees Association is forest grazing permittees consisting mostly of family-type operations that individually have cattle and sheep annually on the Big Horn Forest in the amount of about 200 animal units which indicates that really the forest permittees on the Big Horn are small ranchers. These ranching operations have maintained private lands for generations that supply approximately three-fourths of the feed to sustain these animal units off the forest lands year in and year out.

Financial statements of these ranches have contained these dependable feed sources for many years. Approximately one-fourth of the total forage resource is obtained from the forest grazing allotment of these ranches. The National Forest Management Act is the driving authority of the Forest Service today along with the National Environmental Policy Act, the Endangered Species Act, the National Historical Preservation Act, and the National Archaeological Protection Act. Regulations having the full force and effect of law have been codified in the **Federal Register** under each of

these laws and are constant threats to the Forest Service and grazing permittees of some type of noncompliance. Environmental special interest groups, "interested parties," have gained enormous power to obstruct the management and planning of national forests through the justice systems using these laws to strangle and harm legitimate and necessary uses of the national forest system. The courts are becoming the managers and planners of national forests rather than the professional specialists that are employed by the Forest Service and that are responsible under the National Forest Management Act as well as the Multiple Use Sustained Yield Act, the Resource Planning Act and the Federal Lands Management and Planning Act, and finally and not less, the Taylor Grazing Act.

This recital may seem redundant to this knowledgeable committee but it is crucial to know that all of these laws are acts of Congress and supposedly expressions of, by and for the people. Sheridan County, Johnson County, Big Horn County and Washakie County of Wyoming as well as the State of Wyoming are contiguous and very integral parts of the Big Horn National Forest and should have considerable authority in the planning and management of the Big Horn National Forest.

Private property rights, which includes the accumulated financial reserves of several different sources such as land, livestock, water rights, physical improvements, equipment and machinery and, most importantly, a stable, functional family which includes two to three living generations. Livestock grazing permits on the forest should not be a threat to these valuable assets due to some perception that the ecosystem and biodiversity of which the rancher and his community are very much a part of may be violating some natural phenomena or natural law that is ecologically and evolutionarily irreversible.

My most recent experience with the Endangered Species Act was notice from the Big Horn Forest that the Peregrine Fund, a private, non-profit fund, was wanting to introduce the endangered species peregrine falcon into the westerly reaches of the Tensleep Canyon which is managed by the Tensleep Ranger District of the Big Horn National Forest and encompasses several grazing allotments. The hacking site, nesting site, was near the Big Horn Forest boundary but it was within the external boundary of the forest and additional private agricultural lands lying contiguous to the Big Horn Forest. The normal foraging range of the peregrine falcon is a 10 mile radius. Adjacent to the Big Horn Forest/Tensleep Canyon environs was a what if the falcons did not hack in the forest and were found foraging and nesting on private agricultural lands as an endangered or threatened species? How will this introduction affect the planning and management of the grazing allotments? How much investment of time and money will be incurred to mitigate the intrusion of the peregrine falcon on private lands and adjoining Big Horn Forest lands? Is this bird a natural species of the biodiversity of this NEPA/Endangered Species Act perceived ecosystem of Federal and private lands?

Or is this yet another indirect means to extract livestock ranching from the geographical area for ideological and political whims of the environmental movement using laws that were not intended by Congress to be used this way? Wild and Scenic Rivers designa-

tions by the Big Horn Forest have implications of wilderness management.

My goodness, my time has run out. You have the rest of my statement. I would urge you for horror stories to take a look—which I've mentioned in my statement—strangled in Red Tape that has been published by the Heritage Foundation in Washington, D.C. They speak to many of the issues of which you're concerned and I find that their annotations are very, very valid. Thank you for coming to Wyoming. It's very expensive to go to Washington, D.C.

[The statement of David B. Fuller may be found at end of hearing.]

Mr. SHADEGG. Thank you, sir.

Mr. Brad Palm.

### **STATEMENT OF BRAD PALM, PALM LIVESTOCK CO., ELK MOUNTAIN, WYOMING**

Mr. PALM. Thank you, Mr. Chairman and members of the committee. My name is Brad Palm. I'm a third generation rancher from Elk Mountain, Wyoming, where my family and I currently run a 4,000–5,000 head range sheep operation. We have both Bureau of Land Management Section 3 lands in the checkerboard along the Union Pacific Railroad as well as Forest Service permits on the Snowy Range of the Medicine Bow National Forest in southern Wyoming.

There are three particular areas of Federal intervention that have had an economic impact on my ranch. The first and most economically devastating is predators, primarily coyotes and eagles. The second is the Forest Service and their ability to arbitrarily reduce and eliminate sheep permits on the forest, and the third has to do with reclamation laws and the inability of coal mines to get those reclaimed lands released so that they can be returned to productive use by livestock.

In the interest of time, I'll rely on my written testimony concerning predators. I'll just simply state here that in the past nine years, the losses that my ranch has suffered to coyotes and eagles is in excess of \$1 million.

We spend from July 15th to September 15th on the forest allotments. These range in elevations from 9,500' to over 11,000'. The terrain is rugged and in many places heavily forested. Added to that is the Scenic Byway that crosses the allotments. Because of this rugged terrain and the high recreational use, it is either impractical or the predator methods necessary to control coyotes up there are not allowed by the Forest Service. Because of the high losses suffered over the last three years up there, this year for the first time since my family moved to the Elk Mountain area in 1948, I have decided not to go to the forest and utilize these permits but rather stay on my base property.

Since 1970 I have seen a number of sheep allotments on the Snowy Range of the Medicine Bow Forest reduced from 14 to eight. This equates to a reduction of 2,400 animal unit months or 200 animal units. Current ranch values are from \$1,500 to \$2,500 per animal unit, depending on the amount of federally controlled land on the ranch. Using \$1,500 as a value for the animal unit reduction

on the forest, that equates to roughly a \$300,000 loss in carrying capacity.

With the loss of the compound 1080 to control coyotes in 1972, some of our neighbors decided to get out of the sheep business. Palm Livestock Company was in a position at that time to purchase these sheep. There were four forest permits attached to the sheep we bought and, although we had enough base property to support the additional permits, the Forest Service denied the transfer. Their reasoning was that Palm Livestock Company already had the maximum number of permits allowed under Forest Service regulations. However, we were allowed to utilize these four permits for two years under temporary use permits. Ultimately, the Forest Service combined the four permits into one for 1,000 sheep and traded that for one permit that Palm Livestock Company currently had in its possession and immediately eliminated that allotment as it was in a high recreational use area.

The net result of this action was that Palm Livestock Company, which had purchased the 4,000 sheep and run them on the forest for two years, was suddenly forced to leave all of those back on our private lands where we had to compensate by reducing the number of other livestock we had down there. This equates to 1,600 animal unit months or 133 animal units, roughly a \$200,000 devaluation in the value of our base property and carrying capacity.

That was not the last time the Forest Service did this to Palm Livestock Company. In 1991, we decided to split into smaller ranches to avoid conflicts between family members. In the process of doing so, it required transferring forest permits from parent company into spin-off companies. Although the ownership of the ranches and the Federal permits remained in the same family, technically, according to the Forest Service, there was a transfer of forest permits. The Forest Service took this opportunity to try and eliminate two more permits from Palm Livestock Company.

Knowing that the Forest Service would probably attempt this, I had asked the county agent the year prior to do some utilization studies up there to determine what kind of forage utilization our sheep were making on the forest. Those studies showed that we were using approximately 23 percent of the forage under current numbers and so there was no scientific justification for eliminating those allotments. But according to the Forest Service, since the forest plan for the Medicine Bow Forest calls for an emphasis on recreational use, they were justified in eliminating those simply to reduce the amount of conflicts between recreationists and sheep.

I see that my time is up, and you have my written testimony so I'll just leave it at that. Thank you.

[The statement of Brad Palm may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.

Mr. Bryce Reece.

**STATEMENT OF BRYCE REECE, EXECUTIVE DIRECTOR,  
WYOMING WOOL GROWERS ASSOCIATION**

Mr. REECE. Thank you, Mr. Chairman, members of the committee. I, too, would like to welcome you to our great state of Wyoming. My name is Bryce Reece and I'm the Executive Director of the Wyoming Wool Growers Association. I'd like to preface my re-

marks by saying that if this hearing had been held here in Wyoming two years ago, I would have testified that I sit here and represent 1,500 active wool and lamb producers of the state of Wyoming.

As we meet here today, I have to tell you that I represent approximately 1,000 producers. In the past two years, the sheep industry of my state has seen a dramatic decline of both sheep members and producers, due in large part to the main point of my testimony today. You may notice coincidentally that the decline in both Wyoming sheep and producer numbers coincides with the passage of the act by Congress to eliminate the wool incentive program. This is not a coincidence, but I'm here to tell you that the action Congress took in 1993 to eliminate the 50 year old wool program is not the direct reason we have seen 33 percent of our producers and 32 percent of our production base leave the business.

In reviewing the many ways the producers I represent face losses of their private property, many examples came to mind, examples like we've heard today such as wetlands, Endangered Species Act, and a myriad of other environmental laws and acts. But the best example that I can give you on behalf of my industry is the No. 1 problem our industry faces. According to the Wyoming Agricultural Statistics Service 1994 Sheep Predator Loss Report, the Wyoming sheep industry lost conservatively over 96,000 head of sheep and lambs to predators in 1994. The estimated value of this loss was \$4.23 million. The largest loss by far and away was due to the coyote with 72 percent of the total loss. The second largest loss was attributed to the eagle with 12 percent of the total. Losses to eagles showed for the second straight year the largest single percentage increase and, in fact, losses attributed to eagles have increased 180 percent since 1990.

Our inability to deal with these losses is directly attributable to either the actions, in most cases, or inaction of the Federal Government. The start of our inability to control the predator problem began in 1972 by the action of then President Richard Nixon. President Nixon, due to pressure from radical preservationist groups like many of those that have put out the misinformation on this hearing today and whose main motivation then as it is now was to force the western livestock industry out of business, issued Executive Order 11643 which banned the use of the compound 1080, the toxicant which the industry relied upon to keep coyote populations under control.

The next action or, in this case, inaction by the Federal Government was ironically the mid 1980's ban by the European community on the fur from most countries including the United States. The United States government did nothing to stop this action, and the market for these furs and correspondingly the value for them virtually ceased to exist overnight. We can trace an increase in losses to our sheep and lambs directly to when the ban went into effect.

The next blow to our industry came in 1992 when Director Baca issued the order to cease all lethal control on Federal lands in the west. This order hit the Wyoming sheep industry particularly hard as over 90 percent of the sheep in Wyoming are estimated to spend a portion of their lives on Federal lands.

I would like to address one very disturbing and totally unfair aspect of these whole issues and that is the issue of losses to eagles. This is the most dramatic example that I can think of by actions of the Federal Government of takings of private property without compensation. While a coyote by far and away is the most significant predator in terms of damage to the sheep industry, we have leased or able to take a limited and wholly inadequate action against the coyote to try to protect our livestock. This is not true in the case of the eagle. I want to preface this by saying that the bald eagle is not the problem. The problem that we are facing is due to the golden eagle. Almost all of the losses attributed to eagles is a direct result of the golden. The golden eagle is not a threatened or endangered species and never has been. The golden eagle receives protection because of the Bald Eagle Protection Act. What is not recognized is that the golden was never in danger of being threatened or endangered and yet, by virtue of this protection, we are left totally and completely defenseless and without any means to control or stop the losses from these animals. Our producers are forced to wholly pick up all of the financial loss from these animals.

My time is up, too. You have the rest of my testimony. I'd be glad to take any questions.

[The statement of Bryce R. Reece may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.

Mr. Chas Kane.

#### STATEMENT OF CHAS KANE, SHERIDAN, WYOMING

Mr. KANE. I welcome the committee to my home town of Sheridan and I wish you had time enough to stick around a little bit and we'd show you some really pretty country.

My name is Chas Kane. I manage a family corporation that is engaged in the business of raising beef cattle. My grandfather homesteaded about 15 miles west of here at the foot of the Big Horn Mountains in 1880 and the Kane Family has been here ever since and the original property is still owned by Kanes. Our ranch and nearly all ranches along the mountains are dependent on forest permits for approximately four months forage for a given number of cattle. The permits are 10 year permits, 10 year term permits. There are certain requirements you must meet to hold a permit. You must own 100 percent of the cattle on the permit. You must own enough property to feed the cattle for four months and then you're allowed to lease other grass or whatever, and you must pay the annual grazing fees before entering the permit, to name a few of the requirements.

At the present time, our grazing fee is set by a formula calculated by the Secretaries of Agriculture and Interior. When the Livestock Grazing Act becomes law, a formula will be set by statute that will be much more reliable. Our non-fee costs have risen constantly for the last several years. These are the costs that are having a devastating effect on permittees. The Forest Service, in addition to requiring us to bear half the expense of construction of range improvements such as fences and water developments, require us to bear 100 percent of the cost of maintenance and we also have to furnish all material for maintenance.

Beginning this 1995 grazing season, the Forest Service is requiring the permittees to do their own monitoring of forage utilization. These practices will require setting up transects, measuring residual stubble height, establishing photo points, recording the data and so forth. We have no assurance that any of the data that we collect will ever be accepted. All these regulations are very time consuming and costly. While this may not be a takings, it definitely has an impact on the management of the home ranch and the bottom line of the balance sheet.

The Forest Service operates under some 150 laws. The problem is the regulations that they write to administer these laws. Regulations that change the intention of the law and the intent of Congress and I'm sure that a lot of the laws that you folks write, you don't even recognize when you see all the regulations that are tied with it.

When we talk about private property rights, it is my feeling the Federal Government is intruding on the rights of the citizens of Wyoming and the State of Wyoming itself. The Equal Footing Doctrine declares all states will be admitted to the Union equal. With the Federal Government holding 49 percent of the land in Wyoming, we are hardly with the eastern states which have very little, if any, Federal land within their boundaries.

On a much smaller scale, the Forest Service decided to shorten the length of several permits on the Big Horn Forest for the summer of 1995. Some of the permits were shortened by as much as three weeks. This decision was made without any scientific data to justify such actions. While this action is for the current summer of 1995, I fear that this could become an annual action and thereby a permanent takings of a portion of the permit. We have cow camps that are essential to the management of the resource and the livestock. The permittees built and maintain these camps. In recent years, the Forest Service has claimed ownership of these camps. I believe because we as permittees have built and maintained these camps, we should own them. If, in fact, the Forest Service does own them, I would consider this a takings.

Thank you for the opportunity to address this committee, and I would be glad to answer any questions at a later time. Thank you.

[The statement of Chas Kane may be found at end of hearing.]

Mr. SHADEGG. Thank you very much, sir.

Mr. Mark Gordon.

#### STATEMENT OF MARK GORDON, BUFFALO, WYOMING

Mr. GORDON. Thank you. Thank you, Mr. Chairman, Mrs. Cubin, members of the Task Force on Property Rights. My name is Mark Gordon. I am a rancher and a property owner from Buffalo, Wyoming. I grew up on a ranch in Kaycee, a little town south of here. While there, I served as District Supervisor for the Soil Conservation Service, a position that I served with Don Meike's brother, Pete Meike. I've also served in other civic capacities. I have two children in grade school and a mortgage I'd love to pay down as quickly as possible.

Please let me make this clear. My comments are my own and don't represent anyone else. My parents—it's interesting, there are so many neighbors here. My parents bought bulls from Senator

Wallop a long time ago. Tom Rule bought my sheep a little bit ago. So on and so forth. Dave is a good friend of mine. Dave Fuller. I must apologize up front at the unpolished nature of these comments. It's hay season and you didn't plan the weather very well.

My experience with Federal land management agencies goes back some time. Years ago, probably around 1979-'75, I guess—the Bureau of Land Management decided to pursue primitive area designation for the North Fork of the Powder River. At that time, ranchers met willingly with the Bureau of Land Management, had a great discussion. There were several issues that we discussed openly and thoughtfully. Unfortunately, the Bureau at that time, in my opinion, had too many masters to serve and the conversation fell apart and that, in part, engendered the problems that you've seen Don Meike allude to with the water act. Anyway, that relationship has been hard to break. We're starting to see some difference in the way the Bureau is acting.

Let me mention my other ranch. I have a ranch in Kaycee that I share with a partner. We've had very good relations with the Bureau of Land Management there. We're pursuing a type of management that is not foreseen in all the Federal regulations. It's somewhat controversial. The Bureau has been willing to work with us. We haven't agreed on everything, but we have a good working relationship.

On my own ranch—I bought a ranch in Buffalo just down from Tom Rule's a little bit ago—we also have Bureau lands. I have had very good relationships. If I may share an experience with you on that. I wanted to build a fence. One of the things we're doing with our management of livestock is doing a lot of cross-fencing. The fence went mostly on my land. It went from a Federal chunk to a Federal chunk but it was all on my land otherwise. It took a matter of weeks before I was able to get permission to go ahead—actually, it was within a week about—to get permission to go ahead and build the fence. I was pretty delighted with that. I also have to say that each year when I renew my permit, it's not a problem. I enjoy the conversations that I have. I get some ideas. We share a lot of information and my only disappointment is I've tried to get them to help me do the monitoring which I want to do to prove that grazing is a compatible use with public lands and, because of budgetary constraints, they've been reluctant to do that.

Let me say I understand there are a set of pulls on public land and I lease willingly and knowledgeably of that circumstance. I see I'm getting close to the end. Let me get to my big point.

It seems to me cooperation is something that we have missed here. I worry that the way this particular question has been phrased, it's been phrased as private property versus protection. Let me turn that around somewhat. As a private property holder and as somebody who bought in the neighborhood of the Big Horn Forest, I understand my property is of greater value because of that forest proximity. I also understand that I'm beholden on my neighbors to act responsibly and as good citizens. I am somewhat concerned that the scope of this legislation will in some ways impede the opportunities I have as a citizen to seek compensation against my neighbors if they were to act poorly and that, I think, is something that's been missed in this discussion. It's something

that Senator Wallop's sister was worried about years ago when surface mining was a problem on her ranch. It's something that has been a problem here in the past, and I urge you always to be careful of the balance that you've talked about and respect all of our private properties.

I guess my time's up. Thank you.

[The statement of Mark Gordon may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.

Mr. Dan Scott.

### **STATEMENT OF DAN SCOTT, PADLOCK RANCH COMPANY, DAYTON, WYOMING**

Mr. SCOTT. Mr. Chairman, members of the committee, my name is Dan Scott. I'm a rancher living in Dayton, Wyoming, and I am exposed and challenged by all of the things that have been brought up today, but I wanted to bring up one more example of what happens when the government in Washington administers over our private property in this part of the world. I also operate both owned and leased land on the Crow Indian Reservation and I wanted to tell about an example of what happened this last year in the settlement of a boundary error that was committed in 1891 by a group of surveyors who tried to survey the eastern boundary of the Crow Reservation and got off the line a considerable distance, up to three-quarters of a mile actually, and the Crow Tribe lost some 36,000 acres of land that was supposed to have been within the reservation.

Congress in 1994 passed legislation settling that boundary dispute and to reimburse the tribe for their losses, but what turned out to be one error has been compounded by some further errors in the fact that part of the boundary was reestablished back to the 207th parallel. There were 14 landowners that had been part of the Federal Government. They had been part of the State of Wyoming, part of the county of Big Horn, Montana, found themselves suddenly to be on the Crow Reservation and under the regulations, the tribal regulations for their people, law and order, hunting and fishing and taxation under the Crow tribe without any representation. They've had the takings of their rights as citizens of the United States, Montana, the county, and also devaluation of their land because of its location now on the reservation.

This was part of the settlement. The other part of the settlement was that there was some state land on the reservation, 46,000 acres of state land. The bill states that the State of Montana and the Federal Government, the BLM, shall exchange that land and the land after the exchange shall go to the Crow tribe as further compensation for their losses. But this exchange will leave some 30 ranchers currently and have been ranching on the Crow Reservation for many years without state leases that have been a valuable and important part of their ranching operations. These will be threatening and damaging and, in some cases, threatening the entire survival of these ranch operations.

Nobody has challenged the tribe's rights to additional land to compensation for the error of that 1891 survey, but the Federal Government was the party responsible for that error in survey. Through legislation they've passed the solution down to the local

people, to the state level and to the ranchers, the private property owners in the area who actually will have the full burden of satisfying the solution to the bad survey.

There is another alternative. There are other choices. The cost of the land in question has been estimated to be valued at a little over \$5 million. The regulations, the effort to go through this exchange of the state and Federal lands it's estimated might be as high as \$10 million to effect the exchange. In this case, the Federal Government should have seen the responsibility and put up the money, the \$5 million, and bought the land from willing sellers on the reservation rather than take land, take leases away from unwilling people who were never responsible for the error in the first place.

This is just an example of what can happen and does happen quite frequently. Again, I can answer any questions, but thank you very much for coming to Wyoming and hearing real ranchers. Hope you get back to Washington and get your job done tonight. Thank you.

[The statement of Dan Scott may be found at end of hearing.]

Mr. SHADEGG. Thank you very much.

Mrs. Chenoweth, we'll start with you.

Mrs. CHENOWETH. Mr. Chairman, I just have a couple of comments. This testimony that we heard all day has been so informative. This panel has been extremely informative and I look forward to reading your testimony in total on the airplane.

Mr. Fuller, a great history. Thank you so much. You mentioned your concern about the Wyoming City issue and Mr. Kane mentioned his concern about the Equal Footing Doctrine and I do want to say that—with regards to reestablishing the state's sovereign control over its water and beds and banks and streams from high water to high water mark have been reaffirmed by the United States Supreme Court in a case entitled *California v. the BOR*, so before the Federal Government comes in and wants to manage your rivers, read that case. Have your lawyers read it. It is so clear. Under the Equal Footing Doctrine that you referred to, we own the water, we own the beds and banks and streams from high water mark to high water mark.

Mr. Chairman, I appreciate your questioning of Stephanie Kessler. I hope she's still here, and I would like to converse with her later on. But she relied primarily in her testimony on a law professor's opinion and his interpretation of some court cases. She is so right. What we need is facts and we didn't get facts there, Mr. Chairman. We simply didn't get facts. I mean it was stated that there was a whole body of law that was disregarded. For the record, starting with *Lynch v. Household Finance*, the United States Supreme Court decided that people have rights. Property doesn't have rights. The United States Supreme Court decided that *Luther Church v. Glendale* and *Lucas v. North Carolina* and *Nolan v. Tygart*, the city of Tygart. Over and over and over again, the United States Supreme Court, not a law professor, but the United States Supreme Court has decided consistently that when government takes property, compensation is due. The United States Supreme Court said in *Sweet Home* case that we didn't do our work as a Congress. We need to be specific about the takings provisions

and, Mr. Chairman, this is exactly what you're doing to right what the Supreme Court said in *Sweet Home*.

So I just want to make sure that—I appreciate all the facts that we're getting, but from every philosophical point of view, we really crave the facts, not their opinions.

Mr. SHADEGG. Thank you.

Mr. Metcalf.

Mr. METCALF. Just a quick comment. I'll be very brief, and it's more of a comment than a question. But the courts have not in all cases, their rulings on constitutional issues have not been accurate. Some were examples here today. I think that the person previously who discussed the constitutional rulings or the rulings by the court supposedly based on the Constitution, we do have the authority to change some things there and to try to get a better equity. I don't think anyone in this room would say that the Federal courts have been right all the time. There have been some activist judges that have made some pretty bizarre rulings and so our job is to try again to attain that balance, to look for the balance between the rights of the environment and the need for the environment, the rights of the people, property rights of the people. That's our basic—regardless of what the court has said.

Mr. SHADEGG. Mrs. Cubin.

Mrs. CUBIN. I have nothing, Mr. Chairman.

Mr. SHADEGG. Thank you all very much. I appreciate your testimony. Particularly, Mr. Reece, your testimony about the losses your industry has suffered and Mr. Gordon, I read your testimony carefully and thought the call you made for balance here was particularly well-articulated, and thank you very much. Appreciate it.

Mr. SHADEGG. With that, we'll call the last panel. Michael Sierz. I'm not sure how you pronounce the last name. Andrea Knutson, and John Boyer.

Mr. Sierz, if you'd begin. Thank you.

#### STATEMENT OF MICHAEL SIERZ, AICP, AMERICAN PLANNING ASSOCIATION

Mr. SIERZ. Mr. Chairman, I'll make my comments brief. You have my written comments and please enter those into the record. Basically, I'm a county planner. I have been a planner for about 20 years in Wyoming and Montana and represent quite a few different interest groups as far as Wyoming Association of Planners and American Planning Association and so forth. As a county planner, I told them that when I come here, I'm going to give them the Wyoming viewpoint here.

Basically, we don't disagree with any of you on some of the abuses of the Federal Government in dealing with some land issues. We have our stories at the county level—we have problems on a daily basis with some of these agencies and some of their basically over-complicated laws. I probably spend about 25 percent of my time trying to keep the county out of trouble with the Federal Government. But we're here as a planning group, national planning group, testifying about local zoning. I know that it's been discussed here. Mr. Wallop has explained that a lot of the zoning regulations and other kinds of regulations have loopholes. It would be a lot simpler thing if you do pass this if you put just a little bit

of language into the current bill. When you talk about planning and zoning and the grandfathering in of those things, that you just put in there "and future zoning or other future permit type systems approved by the local county." That would just take a lot of worry away from us. We're worried more about the future laws that we may pass. Wyoming, as is explained in my document, we've got a lot of people moving into the state. We've got problems with development and so forth and we're more worried about future development than other things.

The second thing I guess we're worried about is the "trickle down" effect. You heard that saying before. Basically, we get a lot of people coming to hearings. They're always Constitutionalists. They're always anti—you know, against what we're doing locally, and we just hope that that doesn't start up there and those people grab hold of that and come to our local hearings and carry on.

The third thing I just want to talk about is that I personally don't agree with some of those other laws; I don't agree with the definition of wetlands and some of those things. If they're a problem, we think that it's a lot better probably to attack or change those laws because a lot of them really need to be revised than start a whole new bureaucracy. I'm worried, being in this business for this long, how you could really decide when 20 percent or 30 percent of takings is taking place. I mean you talk to two lawyers, you get two different answers, two economists, you get two different answers. And then I'm worried about windfalls, and I'm also worried about people just finding this a relatively easy place to jump into. Developers could be saying that they may have some kind of a taking. When they see a chance, they turn out and buy some wetlands. They do a development there but they really only bought the things for taking to start with. We're worried about those kinds of activities.

So it's just the American Planning Association's point of view, I guess, that maybe we should look at changing those main laws before you look at the taking issue. That's basically all I have.

[The statement of Michael Sierz may be found at end of hearing.]

Mr. SHADEGG. Great. Thank you very much.

Andrea Knutson.

#### **STATEMENT OF ANDREA KNUTSON, SHERIDAN AREA RESOURCE COUNCIL**

Ms. KNUTSON. Thank you for coming to Sheridan and giving us a chance to speak. I'm with Sheridan Area Resource Council. I was born and raised in Sheridan, a lifer as it were, and, like all people, we've all had frustrations in dealing with different regulations, whether they're local or Federal. But for the most part, I believe those regulations are for the benefit of everyone. I'm also having some frustration with a hearing where we seem to be getting a lesson in Congressman Shadegg's view of takings, not an opportunity for you to listen. According to the press release, this was supposed to be—

[applause]

Ms. KNUTSON. According to the press release, this was supposed to be an opportunity for us to lobby you and lobbying means being able to speak before a vote is taken. It also means being able to

have someone listen to you and want to hear your opinion, not want to tell you theirs so much. You're supposed to be trying to get information.

We had one little situation here which this does go to local zoning. I kind of agree with what you said about the fact that in the wording of the law as you read it earlier, it did say "those laws already in place." It didn't say anything about future regulations. If you did do something about that, that would certainly be a help. But you can't tell me if a Federal law of this magnitude were to pass that there wouldn't be a trickle down, that it wouldn't start affecting state and local governments. So that concerns me also because I believe that zoning regulations are important.

They were going to put a race track next to my home. The laws were in place. We had to fight but ultimately the race track was not built next to my property. That same race track is now in operation in an area zoned for commercial and industrial use close to adequate fire and medical services and much better public access which even a lot of Federal regulations, that's what they do. They put things where they should be, where adequate services and stuff are already available, not just because someone wants to develop on top of a swamp.

And if developers aren't allowed to build, does that mean that we have to pay them for the loss of value and, if they do get to build, do I have to be reimbursed for the loss of value to my home? I mean without some kind of regulations, how are people going to be able to set value on their property? Property value is based on usage. If a home is in a nice neighborhood, it's valued a lot more than in a bad neighborhood and if a guy wants to put an incinerator next to my home without some kind of laws in place that allow people to make decisions, there is no way to make your financial decisions. You can't buy a piece of property and know you're going to be protected unless there's some kind of regulations in place.

Takings laws will be at the expense of you and I, the American taxpayers. If someone wants to build an incinerator next to your home zoning won't allow it, they could be eligible for a taking. On the other hand, if they're allowed to build, you could be eligible. In every situation where an individual wishes to change the use of a piece of property, a takings could occur. A current takings suit in excess of \$40 million is still pending against the State of Wyoming by Rizzler and McMurray Company for what they perceive as delays in permitting process on a state leased limestone quarry. Are leases truly private property or do they belong to the public? I know when I lease my private property, it is my property and the terms of the lease are dictated by me, the owner.

I also don't believe that livestock are private property but personal property and there is a big different between private property which we're trying to protect here and personal property. All businesses have a cost of doing business. Shoplifting in stores, hail on crops, predation on livestock. Those are costs of doing business, normal, expected costs of doing business and those are losses on personal property.

The Fifth Amendment to the Constitution states that "Private property shall not be taken for public use without just compensation." What actually constitutes a taking of private property is now

the subject of a lot of political debate, both local and national. In '92, Supreme Court Justice Scalia defined a regulatory taking like this. "Where regulation denies all economically beneficial or productive use of land. A total deprivation of beneficial use." To me this means if a private property owner can not find any use for his or her property due to regulations, then he or she may be entitled to a taking. However, just because a property owner can't build a factory on top of a wetland or in the middle of a subdivision doesn't mean he can't derive a reasonable profit from the land.

I have a lot of other things I'd like to say but I see I'm already out of time. I would like to point out that the Sheridan County Chamber of Commerce and a lot of local people participated in this Vision Quest document and in it the people of Sheridan County stated that the things that were most important to them were clean air, clean water, maintaining our quality of life through better planning and encouragement of non-polluting industry and without some sort of protections for wetlands and other things in place, how can we do that? But this was even from our local Chamber of Commerce. This is a great document. If you'd like a copy, you can have this.

Mr. SHADEGG. You're welcome to put that into the record if you'd like.

Ms. KNUTSON. Thank you.

[The statement of Andrea Knutson may be found at end of hearing.]

Mr. SHADEGG. Mr. John Boyer.

#### STATEMENT OF JOHN BOYER, SAVERY, WYOMING

Mr. BOYER. Hello. I'd like to start off by saying that I'm a rancher. I'm a wilderness guide. But most importantly I'm an environmentalist. It's a pleasure to be here. I'm going to dance around a lot of the stuff that I've written and will submit to you, so I'd like you to accept it in its entirety.

It's been a pleasure for me to be here and a little frightening also to be in this room for the last couple of hours. I was amused that Carolyn Paseneaux said that we have to learn to be kind to one another and that it's little people that get taken by the government. I have to tell you that I'm in a very unique position today because I feel like I'm a person who understands a lot that's going on here but I'm also the only person who depends entirely for my life and well being on Federal regulations. My ranch and the property of my relatives' ranch who have lived in Carbon County since 1904 are threatened by the building of a dam and the only regulations, the only regulations that work in my favor now are Federal regulations. If the EPA, if the Corps of Engineers, if the Clean Water Act, if the Endangered Species Act weren't in existence, my family's 640 acres of land behind the Sandstone Dam would be under 220' of water right now.

I come to you because the way these regulations evolve takes a long time. As you know from my written testimony, I spent a lot of time working in Washington. I did cost benefit analysis for the EPA and for President Ford on an OSHA project. I've done a lot of work in the minerals industry and the way these guidelines and things which you are all meddling with evolve is over a long period

of time and with a lot of testimony and a lot of care. If the powers that be, the vested interests in the State of Wyoming had their way, none of the guidelines of the Clean Water Act or none of the guidelines for the Endangered Species Act regarding water development would be considered. My family has spent close to \$40,000 fighting this dam and we wouldn't have had to spend a nickel if we didn't have any of these Federal guidelines because we'd be under water by now.

I also have to tell you that because of the work that we do, as wilderness guides and as Vision Quest guides that we and I are very close to the earth. Even my being here is a little scary because of the nasty tone that exists in this country these days. I find the takings legislation mean-spirited. I find it machiavellian and I think that everybody in this room knows that we have rules right now, regarding private property rights, that protect us. All you have to do is go through the system to find that out.

Let me tell you what I mean by machiavellian. I tried to testify in the Wyoming Agriculture Committee hearing about Representative Paseneaux's takings bill this year. I wasn't able to testify, but what I was going to say to her was that I hope that her bill in its entirety passed because then the losses, my business losses and the losses of land and business losses of my relatives would have exceeded about \$1 million. Now for a private property owner to face condemnation and to come to the state to ask for \$1 million because of takings legislation that exists is really machiavellian and I think that's what's behind a lot of the hoopla and a lot of the anger and a lot of the testimony that you've heard today. It is machiavellianism and greed at its worst.

I'll close because my time is up, but I just wanted to tell a little story that I heard the other day on public radio. There's a woman who's been working in favor of the new guidelines for red meat processing and poultry meat processing. Her son nearly died of e-coli poisoning and she's gathered statistics across the country that indicate that over 500 people a year die from a very small number of bacterial viral infections related to meat processing. Over 2 million people get violently ill and often severely affected for the rest of their lives, as this woman's son has. The point I'm making is, that right now, even though these meat processing guidelines which we're trying to get approved and implemented in this country have been implemented in Europe already and we're trying to get them implemented here, one of the leading candidates for President is doing everything that he can to prevent the implementation of this tier of guidelines. And I ask, what is this nasty mood about? What is takings legislation about? I think it's about greed and selfishness.

I should point out that industry and entrepreneurs have never, never been in the forefront of creating their own regulation when it comes to health and safety guidelines. They often but not always cooperate when pushed. Takings legislation won't help industry monitor and control themselves. It will force the taxpayer to pay them not to.

The last thing that I want to say is that ultimately this is a very personal process of individuals getting hurt and individuals having losses. I really think that a lot of the tenor and anger and stuff

that I've been hearing lately really has to stop and we have to start talking. If you want a radical environmentalist, somebody who speaks from his heart and does a lot of work around spirit—which I think is really lacking in this country—to work with you, you'd better come to me because I'm on the side of this issue and I know how strongly I feel it and the mean-spirited attitude that I pick up in the press all the time and from the words on the radio and stuff, it just better stop.

Thank you very much.

[The statement of John Boyer may be found at end of hearing.]

Mr. SHADEGG. Let me start by saying, Michael, with regard to your testimony, it clearly is the intent of any Federal legislation not to touch any local or state or city zoning, and I certainly will take your comments regarding the language here, which I thought were very measured, back with me and would work on language to make that very clear because no one intends any Federal legislation to touch what you do in the state directly in any way. It is intended really to address only Federal legislation and to keep its hands out of affecting city zoning or county zoning or any state regulation. So I thought those comments were well taken and would be happy to carry those back.

Other questions?

Mrs. CUBIN. Mr. Chairman, I don't have questions but I do have a closing statement. Would that be appropriate at this time?

Mr. SHADEGG. I believe so. Yes.

Mrs. CUBIN. Thank you. There has been a lot of discussion about how much private property can be taken by Federal bureaucrats today and I want to make it clear that I think the Federal Government has been increasingly intrusive. I think the Federal Government has been too intrusive in the last several years. The Federal Government has taken all the taxes that we will give to it and now it is taking our property, too. It's taking the very substance by which it is supported, and I think that's a mistake. I want to make it a smaller and more effective government and I want to make the Federal Government less heavy-handed. I think everyone could agree that private individual rights are protected when the government is less intrusive, whether it's the state government in the case of Mr. Boyer or whether it's the Federal Government or the city or county government, whichever. I think the State of Wyoming does a good job in achieving state laws without threatening property rights and I think the Federal Government can do the same.

I appreciate the passion from the people who have testified and the people who are in this room on both sides of this issue. I know that by working together we can achieve our mutual goals, that is clean air, clean water, a clean environment and protecting what we are guaranteed under the Constitution. I am proud of the quality of testimony that I've heard today and I feel lucky to be from this great state. Please do continue to let me know what you are thinking, what is happening to you and how you think the Federal Government could do a better job. And I just say, God bless Wyoming, God bless you and God bless America.

Mr. METCALF. Again, a quick closing statement. The gentleman mentioned that this mean-spiritedness has to stop, and I agree

with him, on both sides. There are some greedy people that are looking forward to some takings in order to get a special advantage. We also have the government that has done some things in America that would not be tolerated. There is no local law enforcement agency anywhere in this country that, had they done what the Federal Government did at either Ruby Ridge or Waco, those local authorities would be, at the best, out of a job and, at the worst, they'd be in jail. The Federal Government has just run roughshod.

In one case right in my area near Seattle, the FDA came into a health food store with automatic weapons and had a gun to the head of the secretary and so forth and absolutely peaceful people. We've seen both sides. Both sides have to ease up. So you're right in that. But our job is to try to get the Federal Government in this balance and we hope that it will also work to be a balance everywhere because you do have to—final analysis, we have a civilized government, you're going to have to have people sit down and work things out without doing the kind of things that at least certainly the Federal Government has done, and we've had some brutal treatment of the environment in the past. We hope we've learned.

Mr. SHADEGG. Mrs. Chenoweth.

Mrs. CHENOWETH. Mr. Chairman, I have no questions but I do want to thank you and Mrs. Cubin for allowing me the opportunity to come to Wyoming. I really appreciate all your testimony and will study it.

Mr. SHADEGG. I simply want to conclude again by thanking each of the witnesses. I suppose I'd like to pick up on Mr. Boyer's point. It really was Mr. Metcalf's point at the beginning. It's appropriate we should conclude with Mr. Boyer's point. It was that we do have to listen to each other. We do have to try to find a more temperate climate in which we can exchange views, and I compliment you, Mr. Boyer, on your remarks. I compliment you, Mrs. Knutson. I think we are working toward a better understanding. I'd like to think that my mind was open during the hearing and that I learned a great deal from your comments and the comments of many of the other witnesses as well as Mr. Boyer's, and I appreciate you all being here.

I also appreciate all the people in the audience taking the time to stay with us and be here for this important hearing and with that, I gavel the hearing to a close. Thank you very much.

[Whereupon, at 12:40 p.m., the hearing was adjourned subject to the call of the chair; and the following was submitted for the record:]



Malcolm Wallop  
U.S. Senator (R-WY ret.)  
*Chairman*

Testimony of

The Honorable Malcolm Wallop

U.S. Senator (R-WY ret.)

Chairman

Frontiers of Freedom

*"Private Property and Personal Freedoms"*

Before The

Private Property Task Force

The Honorable

John Shadegg (R-AZ)

Chairman

***Sheridan High School  
1056 Long Drive  
Sheridan, Wyoming***

***Monday, July 17, 1995 9:00am***



1735 North Lynn Street  
Suite 1050  
Arlington, VA 22209  
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Mr. Chairman, Committee Members, participants and guests, my name is Malcolm Wallop. I am a former Senator from this great state and I am currently Chairman of Frontiers of Freedom, a grassroots public policy organization based in Arlington, Virginia committed to the preservation of personal freedoms, the right to private property and the sanctity of the first amendment.

During my 18 years in the Senate, the devil which took most of our energy was communism. The Soviet Union was a country which dictated the limits of behavior to its people, was a country without freedom, and was a country that failed and so too did its environment. The United States sat proudly as the world-wide blueprint for democracy and personal freedoms. During the remarkable Reagan years, freedom expanded across the globe. While here in the United States, those who saw virtue in a communist system began their assault. During those years, very slowly, but, in fact, very surely, one liberal Congress began enacting legislation which carefully chiseled away at our Constitutional freedoms. The Constitution became an item of increasingly casual interpretation. If the law had a socially acceptable goal, liberal judges all over the United States would ignore the Constitution and uphold the law.

Today, thirty years after the assault began, Americans are often actively frightened of their government. No longer is the government ruled by the people, but, in fact, the people are ruled by the government. Americans are now too often viewed as subjects, rather than citizens.

Many books have been written about government abuses. I commend to you a book entitled "Red Tape in America, written by Craig Richardson and Geoff Ziebart, and published by The Heritage Foundation. "Red Tape in America" is a compilation of citizen experiences detailing government abuses at the hands of the Fish and Wildlife Service, the Bureau of Land Management, the Internal Revenue Service, the Food and Drug Administration, the Department of labor and a myriad of other government agencies.

Americans who have experienced the cold, cruel slap of our government know first hand how vindictive it can be to its citizens. Unfortunately for liberals, citizens across America are now waking up to the realization that government has become well too intrusive, and that it goes well beyond the Waco debacle or the tragedy at Ruby Ridge. Those incidents are examples of a vengeful, roguish government. Americans are beginning to understand that minor examples of abuse take place every day. But there is nothing minor about government abuse when it happens to you

I know this hearing is specifically about property rights. But I submit to you, Mr. Chairman, that an assault on any American citizen is an assault on their private property rights. Land is property, money is property, freedom is property. Therefore, the Endangered Species Act is an assault on my land, the oppressive tax code is an assault on my money, and the Food and Drug Administration is an assault on my freedom. Until we begin to understand property rights in its entirety, then we will never win this battle.

To see property rights as simply rewriting ESA is a major mistake. We must see the ESA as a small piece in a puzzle of forgotten freedoms. Until we wipe out all assaults on our personal freedoms, our land, our money, our rights and our citizenship will not be complete.

Repealing the ESA , and then creating a non-regulatory approach to saving endangered species, is an important first step in the fight to regain our personal freedoms and in saving species. If it is in America's interest to save species, and I believe it is, it can not be made the obligation of one American to save what we all are obliged to protect. To do otherwise one could as well say look, you have three extra bedrooms and we have three homeless. Provide them shelter. It is going to take winning every one of these battles to bring back the freedoms with which the Declaration of Independence declared us to be endowed by our creator. No other democracy in the world draws its power from the government. Here government does not bestow rights, it is obliged to protect them.

The examples are endless, but I will only mention three that I think are beyond comprehension and that Frontiers of Freedom will be working on in the next few months.

In Bakersfield, California, a business involving a home for the mentally retarded moved into a residential area. A number of families gathered together to block the establishment of this business through a court injunction on the basis that

their residential area was not zoned for business. In short, the families wanted to keep their neighborhood residential and sought, as is all our right, the protection of the Court and the Court afforded them its protection.

The Department of Housing and Urban Development then stepped in and slapped a law suit on a few of the families, now known as the "Bakersfield Five" for discriminating against the mentally retarded in violation of the Fair Housing Act. During this time, numerous federal agencies, among them the FBI and the IRS investigated these innocent families. When the abuse got to great, they agreed to drop the suit against the business. HUD, however, refused to drop its case against the Bakersfield 5, seeking to punish them for the crime of seeking the protection of the Court.

In this country, individuals, such as the Bakersfield 5, have every right to free speech and to afford themselves of the judicial system without fear of reprisal from the federal government. Today, in this country, the federal government asserts the right to bully you into giving up your rights as an American.

During my last eight or ten years in the Senate, I ran into people who would tell me hair raising stories about government abuse and then in the same breath they say... "don't say anything, they'll get me. I just wanted you to know about it."

Why should any American fear the government? This has to end!

In Fredonia, Arizona, Kibab Industries, a logging and paper business, the major employer in the area, was sued for cutting a portion of the Kibab Forrest prematurely. We are not talking hundreds of acres. We are talking a few trees in hundreds of thousands of acres. It was a miscalculation -- a minor infraction. Because of the minor nature of the violation, the courts sided with Kibab Industries in a suit brought by the U.S. Forest Service. But the Forest Service could not take no for an answer. The Forest Service wanted Kibab Industries out of business. And the federal government finally won. Law suit, after law suit, after law suit was brought against Kibab until Kibab could afford no further litigation. The company could no longer defend itself. The Forest Service sued a business out of existence and crippled the economy of Fredonia, Arizona. Those jobs were lost, that industry collapsed because our government would not allow the ruling of the Courts to stand.

This should not happen, but it does.

And finally is the story of Marge Rector from Texas. Marge bought 15 acres of land to build on for her retirement. She paid approximately \$830,000 for her dream. In 1990, soon after the Golden Cheek Warbler was listed as an endangered species, her dream became a nightmare. Each year her land became more devalued, until today when a land once worth \$830,000 is not just worth a little over \$30,000.

We have all heard these stories, but they bear repeating over and over again so that no one will forget that the federal government can destroy any Americans hopes and dreams.

Yes, let us protect species, but not by trashing the Constitution and making the occupants of the land mortal enemies. Liberals will call us mindless enemies of the environment and protect their loss of power. But we are doing the right thing. As will be spoken today, the ESA harms endangered species in numerous ways. A non-regulatory ESA will do more to save endangered species while offering property owners the ability to own and use their own land. Property, habitat, and species must exist in harmony, or the Constitution, citizenship, and species all will suffer.

Yes... to see private property rights as simply overturning ESA is a major mistake. We must see the ESA as a small piece in a puzzle of forgotten freedoms. Until we wipe out all assaults on personal freedoms - - private property and our persons will never be truly free.

Thank you for allowing me the pleasure of speaking to such a distinguished panel. I am willing to take questions.

# Wyoming State Legislature

213 State Capitol / Cheyenne, Wyoming 82008 / Telephone 307 / 777 7981



*House of Representatives*

REPRESENTATIVE BILL BENSEL  
House District 30 - Sheridan County  
942 Emerson  
Sheridan, Wyoming 82801  
Committee:  
Appropriations

## STATEMENT OF WYOMING STATE REPRESENTATIVE BILL BENSEL

Before the  
Private Property Task Force  
House Resources Committee

Sheridan, Wyoming

July 17, 1995

I welcome the Congressional subcommittee to Sheridan and I thank you for the opportunity to give input as an elected representative of the people of Sheridan County, Wyoming. Though the US House has already acted and passed Regulatory Takings legislation, I appreciate the chance to give a Wyoming perspective on this pressing issue.

The protection of private property rights as granted in the constitution is especially dear to Wyoming and to people who live and work in the western states. That is why these rights must remain balanced between the protection of our individual rights, our neighbors rights and the public good.

We will likely hear testimony today which covers a broad spectrum of positions. I urge you to seek out testimony which is on point and pertinent to issues of government impacts on private landowners as well as the impacts of congressional action under takings regulation.

Reforms and efficiencies in the manner in which regulations and laws work and how these impact people should be under continual scrutiny. But the Takings legislation which has already passed the House and is being discussed in the Senate is not about reform.

Statement of  
Representative Bill Benschel  
July 17, 1993

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These proposals are a formula for bigger government, loss of public health and safety protections, a DC lawyers heaven and a tax payers nightmare. It destroys the fine constitutional balance which has been maintained for more than 200 years, and removes the role of jurisprudence in determination of fifth amendment rights.

This legislation as passed and proposed will be still another all encompassing, one-size-fits-all regulation passed down from the federal government which adds to the burdens and costs of state and local government. There are already far too many broadly written rules, regulations and laws which fail to meet specific needs and public interests of each of our fifty states and territories. Your takings proposals will be an additional barrier to local control and contrary to the best interests of the state.

During my three terms as a state legislator I have listened to numerous concerns and complaints of Sheridan County landowners. Issues about development, growth, planning and zoning and property taxation are among the important issues to this expanding community. Government infringement upon private property rights and heavy handed implementation of regulations have not been priority issues of concern among my rural or urban constituencies and neighbors. I do not, therefore, believe that this issue is foremost in peoples minds. They're busy trying to make ends meet, working to survive in the ranching business and taking care of their families. Congress should spend it's valuable time on real problems and developing real solutions for Wyoming families, workers and businesses.

Legislation such as this has been rejected by the Wyoming legislature in past years. The fifty-third legislature dealt with this issue once again this past winter. Negative consequences were foreseen with the Takings bill, causing significant opposition to the so called Taxpayer Protection Act which was subsequently renamed Regulatory Takings. Sponsors of the bill were forced to present a significantly watered-down version on third reading in the house which called for creation of guidelines to determine potential takings in state agency activities. It does not deal with compensation or other radical components as proposed in current congressional legislation.

After failing on the third and final reading, the legislation was resurrected in an uncalled for and heavily lobbied reconsideration vote and subsequent fourth reading, passing by a slim margin. The Sheridan County delegation voted against this unnecessary legislation which serves up more bureaucracy and fails to assist with the genuine needs and best interests of our constituents.

Statement of  
Representative Bill Benschel  
July 17, 1993

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The people of Wyoming don't want expansion in the size and cost of government, increased taxation, or reductions in health, safety and environmental standards. This will be the result of congressional proposals on Takings. So, the question remains as to whose best interest this will serve, certainly not that of the public.

Well respected organizations oppose passage of regulatory takings which infringes upon our state and local rights. These include the National Conference of State Legislators, National Governors Association, Wyoming Alliance of Municipalities, American Planners Association, Wyoming League of Women Voters, and the National League of Cities among many others. These groups could hardly be categorized as anti-property rights.

Any attempt to define or categorize compensable takings under the fifth amendment or to interfere with states rights in defining regulatory takings must be rejected by Congress if that body is truly one representative of the best interests of the people of the United States and the people of Wyoming.

Thank you, again, for visiting Sheridan to listen to the concerns of Wyoming citizens.

## STATEMENT OF JAN HAGEN

Due to family commitments, I regret not being able to personally attend this meeting today. But I very much appreciate that our experience will be recounted in our absence.

My husband and I moved to the Black Hills in 1989, after many years of city life. The structure of the Hills with it's thousand of acres of public lands was perceived as perfection to us—as our desire was to have horses and be able to ride unencumbered “off into the forest”. We searched for four years for that “ideal” piece of ground next to Forest Service to fulfill our dream.

Then we found it, our “big valley”, just outside of Rapid City, close to town, close to the airport for Ron's travel needs, and best of all, we would be totally surrounded by Forest Service with literally dozens of trails to ride. This was August of 1993.

Two years later, we are just beginning to build our home on our property.—it has taken that long to obtain a suitable road into our land. It has been a nightmare dealing with regulations, studies, and delays.

My complaint is not particularly locally based, although there are a few zealots who truly believe they are protecting the public lands from greedy landowners. We also encountered several whose mission in live was discouraging potential land buyers from purchasing land the Forest Service would like to own—like ours— a property which was the number two property on the Forest Service acquisition list.

After two years of dealing with every conceivable department in our region—on one topic or another, I intimately know where the basic problems come from— and it is truly a “top down” problem. It is summed up in a favorite local saying—“regulation without reason.”

We are dealing with mounts of paperwork for the simplest requests. We are dealing with people who are afraid to make a mistake because it could mean their jobs. These two factors have created an incredibly difficult situation where reasonable decisions and simple problems can not be solved without going higher-up the ladder for approvals or waiting months, maybe years, until they can get around to your project.

An example of just one of the problems we are working on is a road we need to connect our two pieces of property. It is adjacent to an archeological find. The initial report was incredibly vague— someone just drew a big circle and classified everything in the circle as a Class One Arch site—whether or not it had anything important in it. Once it is classified, it is considered “significant” and the requirements to deal with any issue regarding it is outrageous.

Because of the complexity of dealing with private archeologists and having their findings accepted, we hired the State of South Dakota's Archeological Department (nationally respected experts in the field) to accomplish our road study. They found absolutely nothing of significance on the entire roadbed.

After the primary Forest Service archeologist assigned to our project approved the report, a senior archeologist in the Custer office sent the State team a letter requesting that the carbon date the fires around our area and that our team rewrite the initial Forest Service archeological report for the entire defined area around our land. ....And who is to pay for all these extra studies—we (the Hagens). Of course, our State team thinks this is "way out of line" and are currently working on our behalf to get this stopped.

This is an example of a local Forest Service employee going beyond what is reasonable—after all every area of the Black Hills is known to have had fires every 5 to 10 years prior to fire suppression and settlement in the 1900s and what exactly does fire have to do with our arch study. They haven't answered that one yet.

Worst of all, late last fall this same archeologist with the Forest Service allowed a timber company to build a longer more expansive road right through the major arch site next to our land without any of the expense or delays we have experienced .....or the carbon dating of fires .....or the rewriting of their own reports. It simply appears to be a case of something he wants done—and why not let the private landowner pay the bill.

The greatest insult is that this road the logging company built is within 500 feet of our property and it is a full blown year round travelable road which they claim is "out of any archeologically sensitive spots". This was the original route we had requested after purchasing our property.

We begged for this entrance because it was a mile shorter to our house site than the road we ended up building and it connects directly to the road we are completing studies on between our two pieces of property.

The Forest Service told us it would cost a quarter of a million dollars to mitigate the arch site on this road and they would never allow it to be built. Well the road was built for the logging sale and—we were—and are still denied this access because the area is — "too sensitive for the public to use."

We have paid the Forest Service for at least 7 hydrology, archeological, and wildlife studies because they are so backlogged it would take years to have them done on their "time schedule".

And why the backlog? ...They state appeals and budget cuts.

The environmentalists appeal everything logging sale without any financial recourse or concern for the many impacts it has on the public or the landowner. Our local office is so far behind because of the appeals, that they can not get to many necessary public and landowner projects.

I want to commend Frank Cross, our District Ranger, who took charge of both the Harney and Pactola Districts last year. He is trying to bring reason and sensitivity back to dealing with the public and the landowner—that has been lost in the past.

Mr. Cross takes time to work through issues with all us. And even though we have not gotten what we might perceive as "our desire result" all the time, I truly believe that he has the best interest of all the users of the forest at heart. We respect his efforts and believe he is sincere.

Washington must come understand that these overwhelming regulations that the district Forest Services personnel must deal with are not universally applicable—that each forest has its own needs that vary greatly from region to region. It is time to look at our natural nurseries as a place desperately in need of constant nurturing. We need to "prune the forest regularly" and we need to educate the public on the realities "not the hype" that is required to keep it healthy for future generations.

Lastly, as a Republican who is truly sick of the waste in government and overspending on programs that do not work, I feel cutting budgets on our forest and eliminating personnel is a mistake. The forest must be managed and it is one of the few government entities that actually brings revenue back to the people and which is primarily self supporting.

This is a very sensitive asset. By cutting budgets, the public is damaged and real needs for the health and welfare of our forest can not be properly met.

It took quite a while and a great deal of research to understand the complexity of regulations our Forest Service is required to work under. After personally seeing the enormous size of the manuals containing regulations, it is amazing to me they get anything accomplished.

Congress makes laws and then turns to the bureaucrats to write the regulations to implement them. It is time for our Congress to seriously look at what is being downloaded on our agencies and ultimately on to the American public—I am sure most do not have a clue just how outrageous it has become.

If Congress wants to cut costs and employees at the Forest Service, then they had better be prepared to cut down the regulations that have created the need for all this staff.

The movement among Western states to take control of federal lands is a serious one. Poor management and the need to protect revenues for the counties and local communities is an important issue which the Governor of South Dakota is meeting head on. He states that if the Feds can't do it, we can—better and cheaper.

Private landowners who border Forest Service lands are a brave and patient lot—becoming one of them has been an experience I probably would not have chosen had I known just how difficult and time consuming it would become.

We are not the enemy. We are also the public who pay property taxes, just like every other landowner, and I think we deserve to live and access on our land in a reasonable manner, without having to threaten, beg, or run to our congressmen for help.

How can this be accomplished? Only from the top down, only by responsible legislators who are willing to eliminate unnecessary bureaucracy and bring an "attitude adjustment" to government and its dealings with the public in general.

**TESTIMONY OF WYOMING STATE REPRESENTATIVE  
CAROLYN PASENEAUX  
before the  
UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE on RESOURCES**

*PRIVATE PROPERTY RIGHTS ISSUES*

**Sheridan, Wyoming  
July 17, 1995**

Goodmorning Representative Cubin and panel members. I welcome this opportunity to testify on the very important issue of Private Property Rights. Thank you. I am Representative Carolyn Paseneaux. I represent House District 38 in the Wyoming State Legislature and as you may or may not know I sponsored state private property rights legislation, which is now law, in the 1995 legislative session

**INTRODUCTION**

Private property holds a pivotal place in free societies. It is the hinge pin on which all other civil liberties turn. The right of basic freedom,, religious worship, free speech, the right to vote, etc.---all are vitally dependent on the right to own property. If the people in their individual capacity own the land, which is the wealth of society, government must depend on the consent of the people to operate. The government which depends on people for money must pay attention to what the people say.

Conversely, if the government owns or controls the land through regulation, it does not need approval of the people for its actions because it has control of the wealth it needs to carry out those actions.

"Let the people have property," said Noah Webster, "and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of any other privilege."

Preserving private property inevitably leads to the preservation of other basic rights guaranteed in the U. S. Constitution. If a person's property was

subject to unlimited regulation by a government agency, that person would be effectively "chilled" from speaking out against his condition in fear of retaliation. Such is the case for many Americans today.

The concentration of the wealth in the United States through the nationalization of land had been going on for over 100 years. Nationalization of land can be accomplished through outright purchase of private property by the federal government, through condemnation, through confiscation without compensation, or control of private property through the passage of regulations. For most of the 100 year history of nationalization, the brunt of the practice has been borne by the western states and Alaska, but more recently, the nationalization process has been extended to every state in the nation. These actions have been the catalyst for the grassroots rebellion demonstrated by the birth of organizations such as the New York Private Property Rights Clearinghouse, the Washington D.C. based Defenders of Property Rights, Peggy Reigle's Fairness to Land Owner's Committee in Maryland, the Black Hills Multiple Use Group, Wyoming Resource Providers and the several hundred other groups across the nation which exist to defend private property rights against the federal government.

To win the battle being waged over private property rights and interests in the so-called "public lands" in the western states, over the recreational use of those same "public lands", over the use of private lands which have been designated as "wetlands," over the use of private lands which might fall in the so-called critical habitat of an endangered or even sensitive species, over the use of private lands which will be restricted and perhaps lost under the smothering ecosystem management plans being developed by federal agencies, and over the use and ownership of water rights, individuals have found that they must join others whose lives are equally threatened and thus have begun to network across our great nation and speak out against the abuses, and those who have the means to do so are going to court.

The critical mass of action by the federal government against private property rights has been the source of a quote from Mr. Perry Pendly President of the Mountain States Legal Foundation of Denver. When Mr. Pendly says, "I love my country, but I fear my government," he speaks for all those individuals who must defend their private property rights from an oppressive government.

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We in America, the country most touted for its freedoms, have created a bureaucratic monster that is slowly taking away those freedoms through a feature of their structure which combines the legislative, executive, and judicial branches in one body, the combination most feared by the Framers of the Constitution.

Administrative agencies promulgate regulations (a legislative function), interpreting statutes in the process (a judicial function). They enforce statutes and their own regulations (an executive function), determine whether regulations have been violated, and assess sanctions against the purportedly offending party (judicial functions). Many agencies have "administrative law judges." When courts abandon their constitutional role as guardians of rights and defer to the judgement of regulatory agencies, then our constitutional system as set forth by the Framers is radically changed.

In 1990 the federal government issued more than 63,000 pages of new, revised and proposed administrative regulations. The volume of regulation does not tell the entire story. The scope of those regulations will make you bow your head and draw your hand over your eyes in disbelief. The individuals who promulgate these numerous and overburdensome regulations are not bad people, they are just people who have little understanding of our personal and economic needs out here in the real world. Yet, despite their power to affect our lives, administrative officials are not held accountable in the same manner that we insist that elected officials are held.

## ILLUSTRATION OF PROBLEM

Let me explain the burden placed on private property owners by federal agency officials through illustration of several actions, two of which I will talk about in some detail as I have been personally involved in each situation.

The first occurred in the early 90's with a document named the "*Vision For the Future, A framework for Coordination in the Greater Yellowstone Area*". This was a joint planning document prepared by the

U. S. Forest Service and the National Park Service which encompassed a very large area of 18.7 million acres of federal, state and private land within the states of Wyoming, Montana and Idaho, called an "ecosystem" by the Forest Service and the Park Service, a term for which there is no scientific criteria by which to define the term. Ecosystems can be what ever the definer wants them to be, in essence a value judgement. To a flea a dog's back is an ecosystem.

The "Vision" document went far beyond the coordination of the myriad uses and levels of government in the region. Instead, it became a philosophical statement, with primary attention given to "a sense of naturalness". Nearly one fourth of the designated area was private land, and this single phrase, if translated into administrative policy, would prohibit human activity perceived as in conflict with this "sense of naturalness, thus precluding all multiple uses on private land as well as on state and federal lands surrounding Yellowstone Park. The history of the entire Yellowstone region, as well as its viable economy, is tied to the use of basic resources. These resources provide the nation with raw materials: platinum, oil, gas, gold, timber and wood products, iron and steel, sheep and cattle, as well as rich recreation opportunities. Look at the chairs upon which you sit, the material in the shoes upon your feet, the rings upon your fingers, perhaps the worsted wool in the jackets upon your backs, all products of this region.

The federal agencies who authored the "Vision" document may or may not have known what their words would create---a regional land use plan (euphemistically called "ecosystem management") that would regulate private and state lands within three western states, effectively distorting private property rights like a pretzel, and curtailing the ability of dozens of private citizens to make a living and continue to live a lifestyle of their choice. Fortunately, Wyoming was represented by two competent, knowledgeable, and visionary Senators, one whom you just heard speak, that saw the dangers and did not allow the document to become an on-the-ground reality.

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The second action of which I have personal knowledge did become a reality, one that is known to any American who watches television or reads magazines and newspapers, for it has become a national event. The long process to officially place wolves in Yellowstone Park began more than a decade ago and culminated this year with the placing of several adult wolves in Yellowstone and the Central Idaho Wilderness area. Grassroots groups and individuals fought the good fight for the twelve years prior to introduction, knowing that once the wolves were placed in the Park, it would be impossible to remove them due to public sentiment.

As a state legislator I am concerned what the economic costs to our state will be during the life of the wolf project. The Wyoming Game and Fish Department will be saddled economically and local ranchers will bear the burden of loss of private property. Not only is the introduction of wolves to Yellowstone an unfunded federal mandate for the state, it will place a heavy negative handicap on ranchers as they will be precluded from protecting their livelihood from not only the wolf, but from other predators as well due to the tools to do so being designated as illegal where an endangered species is involved. Who will pay for the hundreds of sheep run over a cliff by a wolf? Not the federal government, nor will private entities pay eventhough the Defenders of Wildlife indicate they will provide funding for losses. Who will enforce such a promise?

There are other instances of federal regulations affecting Wyoming citizens which I painfully relate to you. Each of the stories are of people, real people, people with families, people with hopes and dreams of what the future will bring, not just some faceless storybook characters who have suffered within the two covers of a book--a book that can be put down and forgotten.

A rancher and his two-generation family living on a Johnson County ranch have been continually harassed by BLM field personnel for nearly a year. Much of the problem lies with the unusual land pattern of intermixed private, state and federal lands in Wyoming and the lack of fences between

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the various designations. The rancher's cows learned that feed came out of the back of a pickup. Their bellies were kept full over the long, snowpacked winter by feed being brought to them in the truck. As spring came along and the feeding stopped, they would tend to follow oil company trucks to the BLM lands as the industry personnel checked their oil wells. The BLM would then call and tell the rancher to get the cows off federal property or he would be in trespass. Now, the BLM could not get to the federal land unless they trespassed over the ranchers private land to see that the cows were on federal property. The federal employees were not given permission to cross the rancher's property, and yet they did so on a regular basis.

Neither the rancher or BLM could afford to fence such a large area. Together, the private lands and state land, on a percentage basis, are more extensive than the federal lands, and yet the federal government dictates what can happen on both private and state lands. This is outrageous and unbearable.

Because of the time it takes to see a process through to fruition eventhough federal action never takes place, the landowner in essence is stripped of the value of the property as he can't develop or sell it because no one else can either.

In 1986 I received a call from a retired couple in Dubois who had just been told by the Corp of Engineers that the land they had for sale on the Wind River could not be sold for the construction of houses as it was a Wetland. All their savings had been tied up in the purchase of the land, it was their retirement nest egg. The property was zoned and perked for home development. What I relate to you next makes the American dream develop into a nightmare.

A federal employee, on his way to Jackson, saw the "For Sale" sign, got out of his vehicle, trespassed across the property, crawled around on the land on his hands and knees inspecting the vegetation, surveying the lay of the land,

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and then concluded it was a wetland. None of us had heard much about wetlands at that time eventhough the Clean Water Act had been passed in 1977, and did not realize the gravity of the "laymans" designation. We were soon to learn that the word "wetland" had as much fear tied to it as though one had been held up and robbed of one's life savings. No one was able to save the couple from loosing their life's savings. They were another devistated victim of the wetlands mania.

Wyoming is an arid state and more than half of the wetlands are man-made, but there is no differentiation between natural and man-made under federal regulation. 75% of the nations wetlands are on private land on which property owners pay mortgages and taxes and upon which the federal government, not the landowner, controls activity.

## **WILDLIFE AND WATER**

Intended to protect private property owners from government thievery, the Fifth Amendment's Takings Clause has atrophied under duress from ever-expanding Congressional power and bureaucratic largess predicated on protecting the nation's wildlife and waterways. Of the two, federal encroachment on private property owners and their constitutional rights first began with water.

Not only wetlands, but non-point source pollution regulation is a means of controlling private property through the avenue of water. Additionally, many of our western dams are at the 50 year mark and permits must be renewed. In a speech to a western state law school, Secretary of Interior Bruce Babbitt said that many dam permits would not be renewed. Water is life in an arid state like Wyoming, and should the dams be destroyed our state could not be sustained.

The story of endangered fish and birds, dependent on the Platte and Colorado Rivers for survival is well known in Wyoming. Extortion dollars are

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paid to the federal government each year for mitigation of the several species, and our state water representatives have been telling irrigators in the Casper area that they may have to give up a part of their water rights for mitigation in the demands Nebraska is making on Wyoming water. If such a scenerio should ensue it would impact all the citizens of Casper because the city buys water from the irrigation district.

Water and wildlife are vehicles for control of private lands because both water and wildlife move from federal lands to private lands. And, yes, if the animals aren't there the federal government will physically move them in. Examples of such audacity have been broadcast across the nation. Even school children are well versed on the transplanting of the wolf and the black footed ferret complete with the astronomical costs associated with each project. Such recovery schemes are irresponsible in the face of the magnitude of the federal deficit.

## **BANKING and PRIVATE PROPERTY**

A major concern facing the banking community today is the unknown direction property values are taking. The primary collateral base for loans is private property, whether it is land, livestock or equipment. If laws protecting private property continue to be diluted through regulation, the value of the property will decline, as does the value of the bank's loan portfolio.

It is a basic premise of finance that long-term debt instruments--whether they be bonds, annuities or long-term loans---are ultimately collateralized by real property in the form of land and its improvements. Likewise, short-term debt instruments such as commercial loans are generally collateralized by the produce of the land.

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The last 20 years has seen more and more regulations on the land. These regulations have a negative effect on both long-term and short-term debt, and according to Mike Dail, President of the Federal Land Bank of Mason, Texas, onerous environmental regulations are a real threat to his borrowers and thus to the Federal Land Bank. Such regulations can cause the bank to undercollateralize with the risk of losing millions of dollars in loan defaults from borrowers who no longer can produce the living from the land that they once did.

The more federal land regulations, the more restrictions are placed on production, be it oil and gas, timbering, mining or agriculture, and the fewer tax dollars available to the state for support of schools and services to the public. Decreasing land values eventually translate into whether we patch the streets or build a new wing on the school house.

## **THE BATTLE FOR AMERICA**

We are in a battle for America. If we abandon ownership of land, private property rights, we abandon our liberty. It is just that simple. The very fabric of this nation-the freedom of the individual to use and own the land-is being threatened by egregious regulations. The warp and woof of the cloth that accomplishes this are such laws as the Endangered Species Act, the Clean Water Act, Biological Survey, the Biodiversity Treaty, NEPA, FLPMA, Rangeland Reform 94, the Clean Air Act to name a few of the hundreds of laws affecting private property, and the accompanying regulations written by federal agencies.

Dr Richard Epstein, a noted legal scholar from Chicago explains the taking of private property by arbitrary and capricious federal government regulations as like taking the juice and pulp of an orange leaving the landowner nothing but the hard rind and seeds. Without the juice and pulp the orange is worthless, and so too is the private property left an idle wasteland without full use of the property.

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It is imperative that Congress act to protect private property in light of the recent Supreme Court decision in the *Babbitt vs Sweet Home Chapter of Communities for a Great Oregon* case. Last week the Court ruled that the "harm" provision of the Endangered Species Act does include the alteration of endangered or threatened species habitat on private property. Legislative reform to avoid regulatory takings whenever possible and compensate landowners when takings are unavoidable is now at the top of the list for a Congress responsible for its citizens' short and long term welfare. It is no consolation that property owners who can afford to mount legal battles against their own government are winning in courts. For every property owner who wins such a battle, there are hundreds, no thousands, who lack either the time or the money to defend their rights in court. Taxpayers foot the bill for billions of dollars in takings claims. This would not be happening if Congress gave direction to the federal government in the arena of private property rights.

Since the ruling in Sweet Home it is possible that getting rid of prairie dogs will be an offense under ESA mandates for habitat, causing a loss of economic use or value of private property without full and just compensation. Enacting a private property rights law will give landowners security in their property rights and they will no longer have to fear having wildlife habitat or wildlife on their lands. We can then return to an era of private stewardship and conservation that predated the ESA. Today, landowners are unwilling partners in the preservation of our natural resources and the enhancement of our resources.

Of the two bills related to property rights action, HR 925 and S 605, I prefer S 605 because it would require takings Impact Statements of new regulations to help prevent takings from occurring. Neither of these bills, however, are substitutes for reform of environmental statutes. Congress must seize the opportunity to reform the Clean Water and Endangered Species Act through the reauthorization process.

Thank you for this opportunity to testify.

Statement of

WILLIAM PERRY PENDLEY

President and Chief Legal Officer  
Mountain States Legal Foundation

before the

TASK FORCE ON PRIVATE PROPERTY RIGHTS

COMMITTEE ON RESOURCES

UNITED STATES HOUSE OF REPRESENTATIVES

on

July 17, 1995

in

Sheridan, Wyoming

Statement of  
WILLIAM PERRY PENDLEY

Introduction

Mr. Chairman and Members of the Committee, thank you for bringing the Task Force on Private Property Rights to my home State of Wyoming. Thank you as well for your diligence in learning first hand of the abuses of private property now taking place in the West.

While we meet today in the West, and while the focus of our work at Mountain States Legal Foundation addresses Western issues, and while the war on the West is uppermost on the minds of Westerners, particularly, although not exclusively, those who depend on the wise use of the federal lands that surround us as well as those in our rural communities, we are not alone. For reference sake I draw your attention to my first book, It Takes A Hero: The Grassroots Battle Against Environmental Oppression. It Takes A Hero tells of fifty-seven Americans who went from innocent bystanders, to victims, to heroic activists.

If there is one lesson that can be drawn from the results of the election on November 8, 1994, it is that there is a nationwide rebellion against environmental extremism, the type of environmental overkill that deems humans irrelevant and renders the protection of our Constitution immaterial. From Portland, Oregon, to Portland, Maine; from Catron County, New Mexico, to the Canadian border in Montana; from San Antonio, Texas, to the Sylvania Wilderness in the Upper Peninsula of Michigan, Americans are afraid and they are angry. President Clinton was wrong when he told of a bumper sticker he saw regarding Americans' view of their government. I have been all around this country and have visited every county in the West. The bumper sticker I have seen says: "I love my country, but I fear my government."

That fear is the result of federal environmental policies that place property owners at the whim and caprice of federal agents and expose their land to the vagaries of federal law, law that, to paraphrase the immortal words of Humpty Dumpty, "mean whatever federal officials choose them to mean, nothing more and nothing less."

I will address a number of issues of grave concern to Westerners regarding private property: (1) the Endangered Species Act--what environmental extremists call "the pitbull of environmental laws;" (2) federal "wetlands" policy; (3) the enforcement of federal law by government attorneys; (4) the acquisition of private property by the federal government; and (5) the attempt to link private property advocates and groups to

domestic terrorists. Much that I say here, and more, is contained in my new book, War on the West: Government Tyranny on America's Great Frontier (Regnery Publishing, Inc.).

#### Endangered Species Act

John Shuler raises sheep for a living far out on the prairie of western Montana. Late on a snowy September night in 1989, as he sat watching television, three dark shapes sped past the window and John heard the sounds of bones being snapped. On his way to the sheep pen, he grabbed his rifle from the front porch.

The sheep were in wild panic. Three grizzly bears were with the sheep in the pen. But he did not shoot them; he stepped forward and fired into the air. The bears disappeared. But when John Shuler turned to go back to his ranch house he found himself face-to-face with the mother of the three he had just frightened away. She roared, rose up onto her hind legs, towering above him, and spread her huge forepaws. Fearing for his life, John Shuler shot and later killed the bear.

The U.S. Fish and Wildlife Service charged John Shuler with the illegal "taking" (killing) of a grizzly bear and slapped him with a \$7,000 fine. John Shuler objected, citing the circumstances under which he had killed the bear, and demanded a hearing. Such hearings are held not in a real court but before an Administrative Law Judge (ALJ) empowered by the federal government. The ALJ ruled that in interpreting the self-defense provision of the Endangered Species Act, he would use the test that is applied when self-defense is claimed in the death of a human being. Thus, for the first time in legal history, the criminal law self-defense standard was applied to an animal.

The ALJ applied two principles from criminal law--that self-defense cannot be claimed by a person: (1) "who was blameworthy to some degree in bringing about the occasion for the need to use deadly force," or (2) "who provokes an encounter as a result of which he finds it necessary to use deadly force to defend himself." Applying those rules, the ALJ held that John Shuler could not claim self-defense, because when Shuler left his front porch he "purposefully place[d] himself in the zone of imminent danger of a bear attack." John Shuler was found guilty and fined \$4,000. That decision is on appeal.

No other case better illustrates the threat the Endangered Species Act poses to Westerners and their property than what has happened to John Shuler. It demonstrates both that human life is less important than the well being of wildlife and that private property can be taken willy nilly.

There are a host of problems with the Endangered Species Act, starting with the almost total absence of science in the decision making process. While this is not the place for a full fledged discussion of the absence of good science in the Endangered Species Act as well as its other weaknesses, suffice it to say the Act is more political science than biological science. That reality, combined with the authority it provides federal bureaucrats make it a particularly frightening specter to owners of private property. A recent decision of the U.S. Supreme Court has made that all the more terrifying.

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, et al., was decided on the final day of the last term of the Court, on June 29, 1995. The Court decided that the federal government has authority over the two-thirds of this country that is owned by private citizens. To reach a decision the Court had to determine the intent of Congress when it adopted the Endangered Species Act twenty-two years ago.

In 1973, Congress recognized that the survival of the one hundred species with which it was concerned, required Congress to address two threats: 1) the killing of and trade in species of concern, and 2) the loss of their habitat. Congress concluded that the best approach to the loss of habitat on private property was federal land acquisition. As to the loss of individual members of listed species, Congress declared that type of activity (what Congress called a "take") illegal, punishable by a year in prison and a \$100,000 fine. As to federal agencies, Congress required the U.S. Fish and Wildlife Service to list species as "endangered" or "threatened;" to designate habitat considered "critical" to species survival; and, to issue opinions on whether proposed federal action would jeopardize the existence of species.

Environmental groups wanted more. Of particular concern was habitat located on private property. A variety of environmental organizations asked Congress to add to the definition of "take" (which already included "harass, pursue, hunt, shoot, wound, kill, trap, capture, collect"), the phrase "habitat modification." Congress declined, no doubt recognizing that such a change would not only mix the two issues (protecting individual members of designated species and preserving habitat), but would burden property owners. In the words of the House floor manager, landowners would be "understandably unwilling" to bear such a burden.

When the legislation moved to the floor of the Senate, Senator Tunney (D-CA) offered twenty-four "technical" amendments, one of which was the addition of the word "harm" to the definition of "take." With this change the ESA was signed into law. Remarkably, especially in light of Congress' refusal to include "habitat modification" in its definition of "take," the

U.S. Fish and Wildlife Service adopted regulations to define "harm" as "habitat modification." Today the agency prohibits habitat modification that "kills or injures" a listed species, defining injury as "impairing essential biological patterns . . . ." Even worse, the landowner need only intend to perform the act (plowing his field, cutting her trees), not intend to harm the species, to be criminally liable. (State officials have been told they could be prosecuted for issuing permits regarding private property with ESA habitat.)

In a 6-3 opinion, the Supreme Court held that the Fish and Wildlife Service's interpretation of "harm" as including "habitat modification" on private property is a reasonable interpretation and should be permitted to stand. What the Supreme Court did by its decision in Sweet Home is to tell the owners of private property upon which the National Biological Service may identify ESA habitat, that Secretary Bruce Babbitt is their landlord.

The decision tells us two other things of relevance to this Task Force and to Americans who own private property. First, there is something wrong with the way Congress writes federal law that twenty-two years after the passage of the ESA we learn for the first time what Congress intended with the adoption of one four letter word: "harm." Second, something is dreadfully wrong with the manner in which we write these environmental laws when the ordinary conduct of American citizens can expose them to jail time and enormous fines. For under the regulations in Sweet Home, a landowner can go to jail for possessing the intent simply to plow his field or harvest her trees, if the federal government determines that activity modified the behavioral pattern, and thus injured, an ESA species. (The ESA is one of scores of federal statutes that contain such, and other similarly troubling, provisions. For more on the subject of environmental crimes, see Timothy Lynch's "Polluting Our Principles: Environmental Prosecutions and the Bill of Rights," Policy Analysis No. 223, April 20, 1995, Cato Institute, Washington, D.C.).

I would make three recommendations. First, as to the Fish and Wildlife Service's "habitat modification" regulation, I recommend that Congress deny the agency funds to implement that regulation until such time as Congress has had the opportunity to reauthorize the ESA.

Second, the ESA must be rewritten, both to bring it more into line with good science and, in a time of scarce financial resources, to start making some hard choices. In light of the power the ESA gives federal bureaucrats over private property it is essential both that Americans have confidence in the "science" used to justify such authority and that if people are to lose their land and their jobs it is for something more than endangered flies, snails and rats.

Third, in rewriting the ESA, and in the crafting of any federal law, say what you mean and mean what you say. Lack of legislative precision and the adoption of feel good statutory language are recipes for disaster for private citizens. When Congress fails to do its job, when it lets federal agencies and the courts fill in the blanks in federal statutes, then private citizens are condemned to wage a never-ending battle with the nation's largest law firm--the federal government. In such circumstances, we rarely win, as is demonstrated by the decision in Sweet Home.

#### "Wetlands" Policy

Dennis and Nile Gerbaz live in western Colorado, near Carbondale. Every spring, for years past, the Roaring Fork River has flowed high with the melting snows of the Rocky Mountains. As the Roaring Fork plunges past the Gerbaz ranch, the force of the flowing water sets the boulders that make up the river bed to tumbling, emitting the dull roar that gives the river its name.

In 1984, a neighbor requested a permit from the Corp of Engineers to perform some work on the Roaring Fork River. As a result, the river flooded about five acres of the Gerbaz ranch. The Gerbaz brothers asked for a permit from the Corps to correct the problem. The government not only denied the permit, it also refused to visit the Gerbaz ranch to see what was happening to the Roaring Fork River.

The following spring, rocks, trees, and debris created a dam that prevented the river from flowing in its historic channel. Instead, the river poured onto the Gerbaz land, flooding some 15 acres and washing away five feet of precious topsoil over a 2-acre area. The brothers went to a lawyer and learned that the law allowed them to take action without a permit in order to protect their land. So they did. They took the obstruction out of the river, rebuilt the levee that had been washed away, and returned the river to the channel in which it had flowed for decades. One day the U.S. Government came to their ranch and ordered them to report to federal court to pay a fine of \$45 million--each.

The government never told the brothers Gerbaz exactly why it was suing them. Sometimes the government asserted that when the Roaring Fork River flooded the Gerbaz ranch it had created a "wetland" that could not be dewatered without a permit. At other times the government asserted that by rebuilding the fifty-year-old levee the brothers Gerbaz had limited the so-called "reach of the river." Then again it just said that the brothers Gerbaz were supposed to get a permit and didn't. One thing was perfectly clear. The government intends to make a national example out of Dennis and Nile Gerbaz.

Despite President Clinton's well-publicized photo opportunity regarding the Clean Water Act, most Americans know the Act is not about safe drinking water, it is about the ability of federal bureaucrats to exercise the type of control they are now seeking to exercise over Dennis and Nile Gerbaz. (Most Americans also know of the faulty science used to designate so-called "wetlands.") In an example of something I will turn to in a moment, federal law need not be rewritten or regulations revised to give the federal government such authority. All the federal government need do is to bring the type of action brought against Dennis and Nile Gerbaz and the nation's lawyers will be compelled to tell private citizens that while the law says that they can use their land in one way, hundreds of thousands of dollars in legal fees fighting an EPA enforcement action says they can't.

Yet another threat posed by the Clear Water Act to private property rights began when officials in the EPA launched a highly-publicized assault upon oil and gas operators in southeastern New Mexico by alleging that every operator in the region had violated the Clean Water Act. Earlier, the EPA had agreed that the "sinkholes" dotting the land in the region were not "waters of the United States" and, therefore, not under federal jurisdiction. Water produced from oil and gas activities was, therefore, disposed of in these sinkholes. Despite the testimony of scientists that the water being disposed of was of a higher quality than the waters that, on occasion, would pool there, the EPA changed its mind and brought action against the various operators and others.

One of those others was Dr. Squires, a man who, under contract, disposed of the produced waters upon land he owned as well as land he leased from the Bureau of Land Management. He not only had a lease from the BLM to engage in such activities, he had a letter from the EPA stating that the agency did not consider the "sinkholes" to be waters of the United States. Nevertheless, he was forced out of business when the EPA changed its position and issued a cease and desist order.

Yet one more illustration of environmental regulation gone wild is Dr. Squires' attempt to challenge the federal government's assertion of jurisdiction over his private property. The government has argued that Dr. Squires cannot challenge the federal government's cease and desist order until he violates it and exposes himself to a \$25,000-a-day fine and possible jail time. Remarkably enough, the U.S. Court of Appeals for the Tenth Circuit has approved the federal government's position.

What this decision means is that whenever a federal bureaucrat serves a private citizen with a cease and desist order, regardless of the tenuousness of the legal grounds for such an order, the price of admission into federal court to

determine the authority of the bureaucrat to issue the order is a \$25,000-a-day fine. No corporation, let alone a private citizen, can pay that price. The result: capitulation to the demands of federal bureaucrats.

It would appear that Congress is well on its way to addressing many of the concerns property owners have regarding the Clean Water Act. However, I believe Congress must also address the inability of private citizens to simply ask federal courts to determine whether federal agencies are acting within the scope of their authority. As shown, private citizens served with cease and desist orders lack that fundamental right. I have enclosed draft language for the Task Force's consideration.

#### Enforcement of Federal Law by Government Attorneys

The other night, Cable News Network (CNN) reported on a federal court hearing regarding one of the Nichols brothers and his alleged connections to the tragic bombing in Oklahoma City. The subject of the hearing was farmer James Nichols of Sanilac County, Michigan, the brother who did not serve in the U.S. Army with prime bombing suspect Timothy McVeigh. What connection, if any, farmer Nichols has to the reprehensible murders in Oklahoma City remains to be determined. On this day, federal officials were attempting to charge farmer Nichols with the crime of making and discharging explosives, all on his own property, but without benefit of a federal permit.

As the CNN reporter described the proceedings, an artist's sketch of the federal judge hearing the case was shown. It revealed a judge who could only be described as "stunned," his eyes wide, his mouth open in slack-jawed amazement. "Isn't that just a tremendous invasion of the individual's right to do certain things at home, such as a farmer who wants to clear something from his land?" the judge demanded. "This is a pretty dramatic encroachment."

The judge may have been astonished, but I was not. After years of reading legal briefs and motions filed by government lawyers, I have ceased to be surprised by the remarkable positions they take, positions often totally at odds with the laws they are charged with enforcing.

A few years ago, the U.S. Forest Service closed areas of the Wenatchee National Forest adjacent to a wilderness area, despite this language in the Washington Wilderness Act: "Congress does not intend that designation of wilderness areas in the State of Washington lead to the creation of protective perimeters or buffer zones [to] preclude . . . uses up to the boundary of the wilderness area." Undaunted, federal lawyers argued, "There is nothing contained within the State Wilderness Act which prohibits the Forest Service from creating a 'buffer zone.'"

In a Michigan lawsuit filed by a landowner to protect private property rights in a wilderness area, federal lawyers moved to dismiss the case asserting that the Michigan Wilderness Act phrase "subject to valid existing rights," protected only mining claims and not the landowner's water rights!

Two recent cases demonstrate the willingness of federal lawyers to make astonishing, even appalling, arguments to frustrate citizens' legal rights.

In Texas, the owner of timber land sued the federal government for its negligence in permitting the Southern Pine Beetle to escape a federal wilderness area and destroy his property. The Federal Tort Claims Act (FTCA), adopted in the 1930's, allows citizens to sue to recover damages for the government's tortious conduct. Incredibly, federal lawyers moved to dismiss the lawsuit, asserting that the law creating the Texas wilderness--which had nothing to do with the FTCA--impliedly repealed the FTCA.

In Wyoming, an association of sheriffs has challenged the constitutionality of the Brady Act. Under that law, a sheriff may be held criminally liable for failing to adhere to the Act's vague and lengthy requirements. Federal lawyers have asked that the case be dismissed arguing that the U.S. Government has promised never to enforce the law against a sheriff.

Whenever private citizens hear of these and other legal arguments made by federal lawyers they are shocked. In fact, if the American people were made aware of what federal lawyers are saying in court, public disapproval of the government would climb even higher. However, one group of citizens shouldn't be surprised: Congress. Its members ought to know what federal lawyers are arguing and, if necessary, reign them in.

I urge the members of this Task Force to undertake oversight hearings, to learn how laws Congress thought meant one thing, mean something else in the hands of government lawyers. If the legislative process has meaning, if the testimony presented by private citizens and the balancing of interests in which Congress engages is to have any meaning, congressional intent must be preserved. One final comment on the subject. It would be incredibly refreshing if, during the course of such oversight hearings, senators and members of Congress who were on the losing side of Congressional action would censure federal officials for any attempt to turn that legislative defeat into regulatory victory.

### Ending Federal Acquisition of Private Property

During a property rights panel on which I appeared in Austin, Texas, a spokesman for The Nature Conservancy admitted that nearly 90 percent of the land bought by TNC in Texas ended up in federal hands. Following that same Austin meeting, a landowner advised me that he had been called into the office of the U.S. Fish and Wildlife Service and advised that endangered species habitat had been discovered on his property and that he would not be able to build on his land. The official then told him that while that was the bad news, the good news was that an official from The Nature Conservancy--who was standing in the room--was there to purchase the land from him.

The U.S. Government owns one-third of the nation's land, which should be enough. It isn't! (As a recent report requested by the Chairman of this Committee, Congressman Don Young, demonstrates, federal ownership continues to grow by leaps and bounds.) With little regard for the taxpayer, or for the local community, the bureaucracy continues to take more and more land under federal control. Acquisition of private lands by federal agencies is one of the great untold stories of greed and rip-off.

One aspect of the federal government's land acquisition program that is especially troublesome--and has been the subject of an investigation by the Inspector General of the U.S. Department of the Interior--is the manner in which federal agencies use a land-purchasing entity or agent as a "go between" to obtain the land. In situations in which Congress has neither told the federal agency it can buy the land in question, nor given it the money to do so, the federal agency makes a list of the most desired land purchases, to be acquired generally over a three-year period. At that stage the federal agency approaches a land-purchasing agent which agrees to buy the land for the agency and hold it until the agency has the money to buy it.

Although the Inspector General's report disclosed the loss of millions of dollars that have resulted from federal agency's land acquisition program, it did not address two fundamental questions: why does the United States Government need a middle man to purchase land from its own citizens and what is the result of these land purchases? As to the former, sales of land to the federal government is a huge money maker for the land trusts. According to documents accompanying a press release issued by The Trust for Public Land, "Sixty percent of TPL's operating income comes primarily from its land sales to government."

As to the latter, the federal land acquisition program has a number of consequences. First, the property owner takes a tax deduction for the difference between the selling price and the fair market value. Second, the land agent sells the land to the government at its "fair market value." Third, the land agent is

paid for "costs" and "expenses" which the Inspector General faults as excessive, unnecessary, or even illegal. Fourth, the land agent is typically a nonprofit, public interest entity that pays no taxes on its multimillion-dollar enterprise. Fifth, the lands, now in the hands of the government, are off the tax rolls of the typically hard-pressed local government. Sixth, the purchased lands, once in productive use and generating income (multiplied through the local economy) now lies fallow. Seventh, the government will be asked to make federal "payments in lieu of taxes" (PILT) as a small recompense to the local government which in consequence has less productive, income, and tax-generating private property.

Today land purchases by the government is a multi-million dollar business. For fiscal years 1986 through 1991, the federal government spent more than \$992 million taking land off the tax rolls. In 1994, the Clinton administration planned to spend \$348 million to enlarge the federal government's dominion even further and requested \$299 million for 1995.

The federal government does not always buy land outright. Sometimes it simply designates private property as a quasi unit of the National Park System. One example is the National Natural Landmarks program, which first came to the public's attention in a series of articles written by the late Warren Brookes.

Under the National Natural Landmarks program, the National Park Service designates property it believes should be so classified. While the NPS insists that such a designation carries no special meaning, the National Natural Landmark designation exposes the land to local land-use restrictions, and to local, state, and federal bureaucrats and environmental extremists. The NPS, for example, has used the designation of National Historic Landmarks to target future land acquisitions. So far more than 587 such landmarks have been designated throughout the country, and thousands more are in the cross-hairs of the NPS's regulatory apparatus. In the process it seems National Park Service employees have violated the law by surveying private property without the permission of the landowner. A 1992 investigation revealed that "land may have been evaluated, nominated, and designated without the landowners' knowledge or consent."

While this particular program has been applied throughout the nation, Western landowners have been victimized. In 1989, a landowner in Idaho discovered that the National Park Service, without the landowner's knowledge or permission, had proposed that his property be designated as a National Natural Landmark. As a result of that proposal, to which the landowner objected strenuously, federal officials refused to issue permits or to take actions requested by the landowner. To make matters worse, it appears the proposed designation took place at the request of

a private citizen who then used the National Park Service's listing of the property as grounds for attempting to prevent the issuance of various permits and other authorizations to the landowner.

As far as legislative solutions are concerned, I suggest the following: (1) appropriations for federal land acquisitions must be scaled back dramatically; (2) the process by which federal agencies target land for acquisition and request private parties to undertake its purchase, prior to the appropriation of funds for the purchase should be ended; (3) the use by the federal government of intermediaries for federal land acquisition should be terminated; (4) the ability of federal agencies to classify private property to the detriment of the landowner should be stopped.

#### Silencing Property Rights: Linking Advocacy with Anarchy

The night the U.S. Supreme Court announced its decision in the challenge to federal authority over private property under the Endangered Species Act--Babbitt, et al. v. Sweet Home Chapter of Communities for a Great Oregon, et al.--I appeared on the Mac Neil/Lehrer Newshour. Opposite me that evening to discuss the Court's decision was a representative of the Sierra Club. During the course of the discussion we were asked about the property rights movements. Said the Sierra Club representative, "There is a handful of people who kind of had the Daniel Boone attitude that they ought to be able to do with their land anything they want to . . . . [They are] this noisy minority. It's very extreme. It walks around carrying guns. It blows up federal offices. [It] is a minority which is out there saying, repeal the Endangered Species Act. I think that's an extreme position . . . ."

It is clear from this statement that environmental groups believe they can win on the issue of property rights, in the court of public opinion, only if they paint property rights advocates, not simply as the "bad guys" in the battle with environmentalists, but as evil. Thus we have seen, since the unspeakable tragedy in Oklahoma City, an escalation of the rhetoric from certain quarters in their attempt to link property rights with violence and terrorism.

The terrorism that took so much innocent life in Oklahoma City was an act of madness, not of politics. It is neither of the right nor of the left, but of a sickness that has no place in America. It did not result from any grievance, real or imagined, nor was it incited by the musings, murmurings, or even the full blown malignings heard every day in conversations, speeches, and talk radio; or read in newspapers, magazines, newsletters or elsewhere regarding a long list of societal concerns, including the role of the federal government in our lives.

While environmental groups distance themselves, and properly so, from the Unabomber--who killed Gil Murray of the California Forestry Association--allegedly to achieve public policy objectives that sound like those of environmental groups, they seek to link property rights advocates with the killer or killers in Oklahoma City. All of us have condemned violence and terrorism. I call upon all environmental groups to similarly renounce violence and terrorism and not to stand silently by while the acts of environmental terrorism by thugs, make their group appear "mainstream," "reasonable," or in the words of Earth First founder, Dave Foreman, "worthy of serious negotiation."

There is more than the irresponsible, politically motivated utterances of private citizens. Recently, one of my colleagues was in Prince George, British Columbia, to address a small, grassroots gathering of timber workers. Following his remarks, he was confronted by three officials from the U.S. State Department in Vancouver (nearly 500 miles away) who "just happened to be in the area." They criticized his remarks and urged him to exercise restraint in his discussion of the policies of his government when abroad. This, and other similar incidents, cause me to wonder exactly what it is the federal government is saying officially regarding property rights and other advocates of a smaller federal government.

I urge the members of this Task Force both to exercise caution and restraint in adopting legislation that could have a chilling effect upon peaceful advocacy of the exercise of legal remedies to achieve policy objectives and to conduct aggressive oversight to ensure that federal officials are not targeting or characterizing advocacy groups for improper political purposes.

### Conclusion

Much has been written and said about the Takings Clause of the Fifth Amendment and the guarantee that "private property" will not be taken for "public use" without "just compensation." I congratulate the members of this Task Force for their work on this important issue. However, most Americans don't have the financial resources or the time or energy to fight the federal government in a "takings" action. Their preference is that instead of being paid for government regulation that, in the words, of Justice Oliver Wendell Holmes, "goes too far," the federal government be prevented from going too far.

SUPPLEMENT SHEET TO

Statement by WILLIAM PERRY PENDLEY

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TOPICAL OUTLINE

Introduction  
Endangered Species Act  
"Wetlands" Policy  
Enforcement of Federal Law by Government Attorneys  
Ending Federal Acquisition of Private Property  
Silencing Property Rights: Linking Advocacy with Anarchy  
Conclusion

AMENDMENT TO THE CLEAN WATER ACT

Notwithstanding the provisions of Section 309(a), unless the United States has commenced a judicial proceeding either in Federal Court or before an administrative law judge and the judicial proceeding has already commenced with service of a filed complaint, any person charged with a violation of the Clean Water Act or issued a cease and desist order may seek judicial review of said violation or cease and desist order in any Federal Court that has jurisdiction.

STATEMENT OF  
J. HARRISON TALBOTT  
PRESIDENT  
BIG LARAMIE MOSQUITO CONTROL DISTRICT  
BEFORE THE  
HOUSE COMMITTEE ON RESOURCES  
JULY 17, 1995  
SHERIDAN, WYOMING

I am J. Harrison Talbott, 381 Pahlow Lane, Laramie, Wyoming 82070. I am the President of the Big Laramie Mosquito Control District and have been President since 1976, when the District was originally initiated. My testimony is presented on behalf of the Big Laramie Mosquito Control District. I am a rancher and have ranched in Albany County since 1952. In 1976, when we organized our district, our three major reasons (not necessarily in order of importance) for initiating a mosquito control program was for the purpose of 1. reducing weight loss in our livestock because of intolerable populations of mosquitos, and 2. to provide the ranchers, sportsmen and citizens within the area with a reasonable level of human comfort. In other words the mosquitos were intolerable. As to reason number 3, we have a son who contracted encephalitis from mosquitos, therefore human health is also extremely high on our list of priorities.

In December, 1992 the U.S. Environmental Protection Agency (EPA) issued a Review Draft under its Endangered Species Protection Program which indicated 43 different pesticides could not be applied within the species habitat of the Wyoming Toad (Bufo hemiophrys baxteri) (Exhibit A) which an accompanying map (Exhibit B) indicated constituted an area of 997 square miles in Albany County, Wyoming. The Big Laramie Mosquito Control District, which is 37.5 square miles, lies within the 997 square miles placed off-limits by the EPA. The city of Laramie also lies within the prohibited area. Pesticides contained on the EPA list included Baytex (FENTHION) and malathion, both of which have been used for mosquito control in our area. By 1989 the registrant of Baytex pesticide had written a letter announcing it was discontinuing its registration and said, "Essentially the EPA has requested additional extensive tests of Baytex which unfortunately will be more expensive than what our Baytex market is." (Exhibit C) While EPA will tell the Committee that it has canceled the registrations of very few pesticides this letter reveals that the actions of that agency result in the "voluntary" cancellation by the registrant because of EPA's demands for testing beyond the market value of the pesticides. Baytex was effective and cost about 25 percent as much as the BTI now being used in the City of Laramie. The BTI is not as effective and must be used three or four times per year as compared to two applications of Baytex.

In September, 1991 the U.S. Fish and Wildlife Service (FWS) approved a Wyoming Toad Recovery Plan and said "Bioassays conducted on the Manitoba toad (closest living relative of the Wyoming toad) in 1988 confirmed that neither Baytex nor the diesel carrier is

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toxic to Wyoming toad eggs and larvae at expected field concentrations." The Recovery Plan fails to identify what the cause of the decline is, but restrictions on Baytex and malathion were imposed by EPA, based on FWS's recommendations. The upshot of all this is that our effective mosquito control program is now much less effective and more expensive, with the protection of our livestock and humans going downhill.

Currently, in our area, the EPA (and FWS) require our ranches be searched for Wyoming toads before malathion can be used. The government contracts with a private environmental consulting firm for the searches at about \$75,000 a year. If landowners refuse pesticides cannot be used on those lands and their existing neighbors must also provide a one-half mile buffer zone where the pesticides cannot be used. This is blackmail. The landowners are extremely concerned that the government will find Wyoming toads on their land -- and they do not know what the government will do if such should occur. The government makes up the rules as they go and do not tell landowners what their plans are until they are ready to reveal them. Landowners are placed in a position of having pesticide use taken away from them unless they open their lands for these searches. After the landowners were told that only one search would be necessary some landowners were notified that a second search would be required. Landowners are concerned that information other than that involved strictly with Wyoming toads will be gathered by the government.

As an example of the problems the EPA Endangered Species Protection Program, coupled with the FWS Recovery Plan, are creating for our area, FWS notified the Federal Highway Administration in a November 4, 1993 letter (Exhibit D -- two pages) that, "We believe that the installation of box culverts at key ditch and water crossings could reduce possible toad road kills and facilitate migration and expansion of the wild population. Recommended sites include ditches and water crossings between Station 366 and 405 and water crossings in the vicinity of Lake Gelatt, Nelson and Osterman Ponds. The construction of headwalls (retaining walls) where the road goes through Nelson Pond would also help prevent toads from getting hit by cars, and reduce the amount of fill placement in this important wetland complex." That resulted in the road reconstruction project being held up and could have drastically increased the cost of the project. (Exhibit E - from the Laramie Daily Boomerang of 1-4-95).

Prior to 1976 mosquitos in Laramie and the adjacent area were a severe problem. The control program in Laramie was ineffective because mosquitos can be moved by the wind for up to 30 miles. The Laramie control program was only effective until the next horde of mosquitos blew into town. When we initiated the Big Laramie Mosquito Control District it enabled the city program to be successful. With the loss of Baytex in our program reduced our effectiveness, which also meant more problems in Laramie. With the restrictions on spraying until areas have been searched for Wyoming toads our program has been further reduced in efficiency and effectiveness -- which likewise adversely affects the Laramie

Page three

program. Fishermen, boaters, recreationists, homeowners, ranchers and others have been adversely impacted by this conglomeration of bureaucracy imposed on us by the current Endangered Species Act and the EPA's Federal Insecticide, Fungicide and Rodenticide Act. Personally I have attended at least 150 hours of meetings, travelled 1750 miles, and have about \$7,500 in lost time involved in Wyoming toads, pesticides, searches, paperwork, telephone calls, etc.

We enclose a copy of a letter EPA sent to a landowner advising him that if searches of his property is not granted the landowner can not use any of the 43 pesticides on the property. (Exhibit F - 2 pages).

We are certainly concerned about the impact of this, and other programs like it, on the citizens and the landowners rights. If society wants Wyoming toads to be protected and nurtured then society needs to begin to pay all the costs associated with these programs. Society cannot place a higher value on Wyoming toads than they do on hard-working productive citizens and landowners. My rights, and the rights of those I am here representing today, are being eroded by my own government. We object! The Endangered Species Act must be amended to recognize the rights of landowners, and the needs of society. Our own government should protect our rights to private property, as is called for in the U.S. Constitution, and cannot continue to enact laws which conflict with those Constitutional rights. If the Endangered Species Act results in a taking of, or damage to the value, of my property without just compensation then the Constitution is meaningless and property owners are deprived of due process of law. I want the committee to know that the EPA has never completed promulgation of regulations to carry out its Endangered Species - Pesticide program, therefore the landowners have never been given an opportunity to publicly comment on this program which is so severely affecting us and our property. We landowners are suffering the consequences and the economic hardships and we object to society feeling that their responsibility ended when the current Endangered Species Act was written. Scientists know that amphibians are on the decline worldwide and cannot determine the cause. The Fish and Wildlife Service itself says this is the Recovery Plan, "The Wyoming toad (Bufo hemiophrys baxteri) is a glacial relic found only in Albany County, Wyoming. This toad was discovered in 1946 by Dr. George T. Baxter, University of Wyoming zoology professor. Bufo heriophrys (Canadian, Manitoba, Dakota toad) is still common in Manitoba, Alberta, Saskatchewan, Minnesota, North Dakota, and South Dakota." This points out one of the problems with the current Endangered Species Act. The listing of the Wyoming toad is merely a listing of an isolated population of a fairly common toad. That problem needs to be rectified, because society has not shown an inclination to fund all these insignificant listings and landowners should not have to support the "recovery" of something which is actually common.

We thank the Committee for the opportunity to comment.

## Table of Pesticide Active Ingredients (trade names in (parents))

## Wyoming toad

a

ALDICARB - (Temik)	60B
ALUMINUM PHOSPHIDE - (Phostoxin)	60B
ATRAZINE - (Aatrex, Bicep, Marksman)	60B
AZINPHOS-METHYL - (Guthion)	60B
BENOMYL - (Benlate, Tersan)	60B
CAPTAN - (Captan)	60B
CARBARYL - (Sevin, Carbaryl)	60B
CARBOFURAN - (Furadan)	60B
CHLORPYRIFOS - (Lorsban, Dursban)	60B
COPPER SULFATE, BASIC - (KOP 300)	60B
DIAZINON - (Knox Out, Spectracide)	60B
DIMETHOATE - (Cygon)	60B
DISULFOTON - (Di-Syston, Terraclor)	60B
DIURON - (Ureabor, Krovar, Karmex)	60B
ENDOSULFAN - (Endosulfan, others)	60B
ENQUIK - (Enquik)	60B
ESFENVALERATE - (Asana)	60B
ETHION - (Ethion, Ethanox)	60B
FENTHION - (Baytex, Tiguvon)	60B
FLURIDONE - (Sonar)	20C
FENAMIPHOS - (Nemacur)	60B
FONOFOS - (Dyfonate)	60B
MALATHION - (ULV, Cythion, 56)	60B
MANCOZEB - (Dithane, Manzab)	60B
METHIDATHION - (Supracide)	60B
METHOMYL - (Lannate, Nudrin)	60B
METHYL PARATHION - (PennCap-M)	60B
MEVINPHOS - (Phosdrin, Duraphos)	60B
NALED - (Dibrom)	60B
NITRAPYRIN - (Nitrapyrin)	60B
OXAMYL - (Vydate)	60B
OXYDEMETON-METHYL - (Metasystox-R)	60B
PARATHION (ethyl) - (Phoskil)	60B
PENDIMETHALIN - (Prowl)	60B
PERMETHRIN - (Pounce, Ambush)	60B
PHORATE - (Thimet, Rampart)	60B
PROPACHLOR - (Ramrod)	60B
PROPARGITE - (Comite)	60B
PYRETHRINS - (Pyrenone, others)	60B
TERBUFOS - (Counter)	60B
THIOPHANATE-METHYL - (Topspin-M)	60B
TRICHLORFON - (Dylox, Dipterex)	60B
TRIFLURALIN - (Treflan, MTF)	60B

Limitations On Pesticide Use  
Code/Limitation

20C Do not apply to water within the species habitat.

60B Do not apply this pesticide within the species habitat.

-----  
a = Code

Exhibit A

## ALBANY COUNTY, WYOMING

Map Of Areas Where Pesticide Use Limitations  
May Apply To Protect Endangered Species  
Review Draft  
December 1992

## Shading Key



Wyoming toad, *Bufo hemiophrys baxteri*.

The shaded area shown on the map is:

T20N	R73-74W	
T19N	R73-75W	
T17-18N	R73-76W	
T16N	R78W	Sec. 22-27, 34-36
	R73-77W	
T15N	R78W	Sec. 4-9, 16-21, 28-33
	R73-77W	
T14N	R77W	Sec. 22-27, 34-36
	R74-76W	
T13N	R77W	Sec. 1-3, 10-15
	R76W	Sec. 1-18
	R75W	Sec. 1-18.

The species habitat is within one mile of lakes, ponds, streams, wetlands and riparian habitats, irrigated meadows, and associated water supply systems found within this area.

- Legend
- County Border
  - County Seat
  - or ••••• City
  - Interstate, U.S. Highway
  - Lake, Reservoir

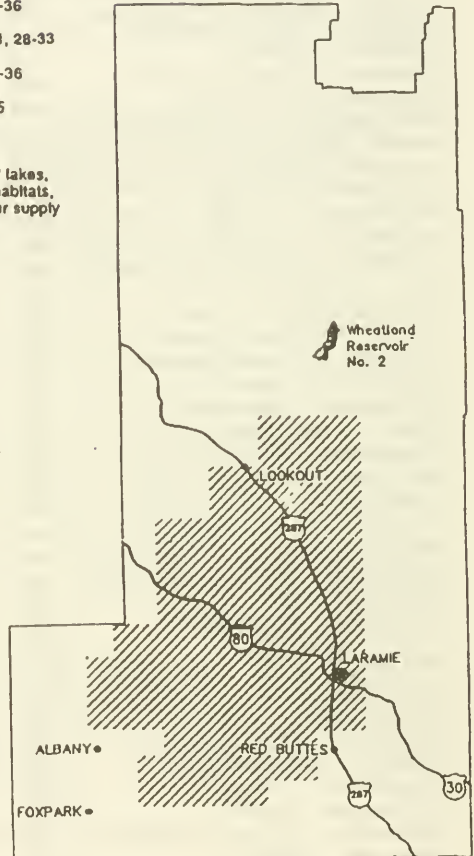
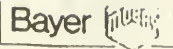


Exhibit B

# Mobay



Mobay Corporation  
A BAYER USA INC. COMPANY

Agricultural Chemicals

P.O. Box 1913  
Hawthorn Road  
Kansas City, MO 64110  
Cable: Kenagro Kansas City  
Telephone: 816/242-2000

February 1, 1989

Mr. Joe Ernst  
UAP Special Products  
1035 E. Dodge  
P.O. Box 1467  
Fremont, NE 68025

Dear Mr. Ernst:

This letter is a written confirmation of our phone conversation on February 1, 1989.

Baytex 4 and Baytex LC will be discontinued as we will be losing our registration for these products. Essentially the EPA has requested additional extensive tests of Baytex which unfortunately will be more expensive than what our Baytex market is.

Mobay will have until April 1, 1989 to produce their remaining Baytex orders. The Mobay distributors will have until April 1, 1990 to sell it to the end user. The end user may use Baytex until their supply is gone.

If I can be of any further assistance please contact me at (816) 436-3352.

Sincerely,

MOBAY CORPORATION  
Agricultural Chemicals Division

*John D. Spaulding*

John D. Spaulding  
Specialty Products Group  
Field Sales Representative

JDS/rmh

Exhibit C



DEPARTMENT OF THE INTERIOR  
FISH AND WILDLIFE SERVICE  
Ecological Services  
2617 East Lincolnway, Suite A  
Cheyenne, Wyoming 82001



WES/6/1/93  
spb W.17 (fhwapahl.com)

November 4, 1993

RECEIVED

NOV 8 1993

WYOMING  
DIVISION

Mr. Rodney D. Vaughn  
Federal Highway Administration  
1916 Evans Avenue  
Cheyenne, Wyoming 82001-3764

Dear Rod:

This responds to your letter dated October 14, 1993, received by this office on October 18, 1993, regarding the biological assessment for the Pahlow Lane and Harmony Lane projects, Albany County, Wyoming.

Based on the information provided we believe that the subject highway project will have minimal effects on the Wyoming toad. However, there is a possibility, based on past sightings, that toads could be encountered in the vicinity of Osterman and Nelson ponds and the wet meadow areas south of the White Ranch. Based on this possibility, we recommend that these areas be searched again prior to and during construction. If toads are sighted, this office should be consulted to determine if measures should be implemented to protect or move individuals from construction areas.

We recommend that the following conservation measures be implemented to facility the protection and expansion of the Mortenson Lake Wyoming toad population:

*NOTE* { Construction between Stations 366 and 405 should be limited to the period of time between September 15 to May 15 in order to protect toads that may use or migrate through this area. By limiting construction to this period, it would also reduce the impacts of sediments and accidental chemical spills to the Mortenson Lake population.

We believe that the installation of box culverts at key ditch and water crossings could reduce possible toad road kills and facilitate migration and expansion of the wild population. Recommended sites include ditches and water crossings between Station 366 and 405 and water crossings in the vicinity of Lake Gelatt, Nelson and Osterman Ponds. The construction of headwalls (retaining walls) where the road goes through Nelson

Exhibit D P.1

Pond would also help prevent toads from getting hit by cars, and reduce the amount of fill placement in this important wetland complex.

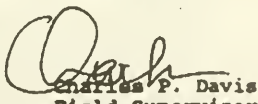
In addition, there are many other valuable wetlands areas that would be impacted by the subject road construction. In this regard, we would like to work closely with you and the Wyoming Department of Transportation in the development of the mitigation plan for these affected wetlands. Potential candidate sites for mitigation of these wetlands impacts may be located on the Service's Mortenson Lake National Wildlife Refuge or Wyoming Game and Fish Department's lands in the general vicinity. If the any of the latter areas are considered, it will necessitate close coordination with the local land manager and approval of that agency.

Provided that these measures are followed, I concur with your assessment that the project, as described, is not likely to adversely affect the endangered Wyoming toad (Bufo hemiophrys baxteri).

I note that prairie dog (Cynomys leucurus) colonies occur in the vicinity of the project. Colonies or complexes greater than 200 acres may provide habitat for the endangered black-footed ferret (Mustela nigripes). If construction (including obtaining fill) will impact prairie dog colonies, please contact this office so we can identify strategies to ensure that ferrets are not adversely affected.

If you have further questions on this subject, please contact Steve Brockmann of my staff at the letterhead address or phone (307) 772-2374.

Sincerely,



Charles P. Davis  
Field Supervisor  
Wyoming State Office

cc: Harry Underwood, WTD, Cheyenne, WY  
Director, WGFD, Cheyenne, WY  
Nongame Coordinator, WGFD, Lander, WY

## Toad habitat review detours road project

by Robert Roten

/ - 4 - 95

Boomerang Staff Writer

A review of road plans by the U.S. Fish and Wildlife Service has caused a one-year delay in a county road project and could stop the project completely, according to county officials.

The project to resurface and widen a 10-mile stretch of Pahlow Lane and Harmony Lane southwest of Laramie has put on hold because of a review by the USFWS relating to Wyoming Toad habitat in the area. The Wyoming Toad is an endangered species. Brad Clingman, supervisor of the Albany County Road and Bridge Department told the County Commissioners at a board meeting Tuesday that the USFWS has had the road plans for the past 18 months. The \$1.7 million road project is on hold until the review is completed.

Clingman told the board that the review of the plans may require "toad tunnels" to be built under roads in the area to allow Wyoming Toads to cross from one side of the road to the other without being endangered by traffic. One of only two known wild populations of Wyoming Toads is located near Pahlow Lane.

Clingman said if the toad tunnels and related retaining walls are required, the whole project may have to be abandoned because of cost. He said the tunnels and walls could add \$1 million to the cost of the project. The road project is being funded entirely with federal money and must comply with all federal requirements.

Clingman said the USFWS may also require the road work to be done during the fall and winter when the toads are hibernating. He said some of the road work cannot be done at that time. New County Commissioner Leah Talbott, who lives near Pahlow Lane, asked about the status of the project at the meeting.

In other business at the meeting, Leah Talbott was welcomed back to the board. She previously had served on the county board before retiring and then deciding to run for office again last year. Pat Gabriel was again selected as chairman of the board and Jerry Kennedy and Richard Anderson were named

(Continued on page 3)

Ref: BART-TS

JUN 27 1994

Mr. Gary Loban  
Rex Route  
Box 120  
Laramie, Wyoming 82070

Dear Mr. Loban:

I have been informed that you have decided not to allow anyone to enter your property to search for the Wyoming toad. EPA is currently taking steps to honor your decision. However, I will take this opportunity to explain the implications that your decision may have on the use of pesticides on your property and offer to you some alternatives that may reduce the impact of pesticide restriction on your property.

In accordance with provisions of the Endangered Species Act and the Federal Insecticide, Fungicide, Rodenticide Act, the Environmental Protection Agency (EPA) has a legal obligation to protect the Wyoming toad from exposure to any pesticide that might harm it. We chose to work with people most affected by our efforts to fulfill these obligations in lieu of regulatory authority. This choice was made from the realization that citizen support provides long term solutions and minimizes the impact to the local community. However, if all affected citizens do not participate we will need to use regulatory authority to insure protection of the Toad. I realize that our choice of problem solving methods probably is of little interest or concern to you, but a review of what we have accomplished through the citizens of your area may be helpful.

By methodically searching for the Toad, we are able to allow continued pesticide use over a larger area that otherwise would have been prohibited this year. The searches will also allow us to greatly reduce the area to be protected in future years while still providing full protection to the Toad. EPA funded these survey efforts, although we were not required to do so, because we are committed to both protecting the Toad and minimizing the impact to the community. By asking landowners to allow searches, we are in no way challenging your right to manage your land but rather working toward a solution for everyone.

In addition to funding surveys, EPA is working closely with the mosquito control districts to develop a pilot program to evaluate alternative methods of reducing mosquito populations that will not affect the Toad and will be as, or more, effective



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TO

FROM CARSON FOLDER &amp; LIT-11 18:51

than the current program. The experimental control effort conducted earlier this year provided very good mosquito control in the test area. We are looking at ways to expand the use of alternatives in future years. If you were to allow a survey on your property, regardless of the outcome of that survey, I will help in adding your land to a future experimental program.

If an agreement can't be reached, I want to make sure that you have made your decision with full knowledge of our position. EPA must fulfill our legal obligation by prohibiting the use of 40 pesticide active ingredients on your property. I have enclosed a list of the 40 pesticide active ingredients and the uses for them that you will be prohibited from using on all land within the area described as: 16-76-9° S2NE4, NW4, SE4, 10° ALL. This action could also affect a neighbor's use of these products if some of their land is within the buffer zone around unsurveyed Toad habitat. Everyone involved has worked very hard to eliminate the need to take an enforcement approach. While EPA would prefer another course of action, we may have no other option.

What I have stated shows you that EPA is honestly working to meet the needs of Albany County citizens. The Citizens' Task Force working on this issue has been able to accommodate everyone else's unique concerns. To our knowledge, you are the only landowner that has decided to prohibit surveying. If we understood your reasons for that decision, there may be something we could do to accommodate your needs and avoid the need for pesticide restrictions on your property. If you would like to discuss this matter further or have any questions, please contact Jack Hidingar at (308) 293-0945. If we do not hear from you by noon, Wednesday, June 29, 1994, we will proceed with regulatory action to suspend use of the 40 listed pesticides on your property. I ask you to weigh your decision carefully.

Sincerely,

*Patricia Bull*

Patricia Bull  
Director

Air, Radiation and Toxics Division

Enclosure

cc: Mr. Lou Shilt, Albany County Commissioner

four children; M. Waide Jensen of Byron, Richard W. of Laramie, Charlene Scholes of Torrington, Idaho and Erma Lou Jensen of Billings, Mont., two sisters, Louise Jones of Salt Lake City, and a son, Byron. Service Ward LD Byron Co.

EPA, said the agency would allow more time to comply with the standards should there be some unforeseen delay in obtaining the necessary equipment.

s, action is added to tortu and this year was ception. With a Bawdy House where act in dramas were prese-

This was a part of a news article, written in 1975, about a mosquito control program conducted to protect livestock. Everett Spackman, University of Wyoming entomologist conducted the program on a small area of the Big Laramie valley. It proved that a small area of control was ineffective and that in order to succeed a larger area of control was necessary.

and. The t Priscilla a", while ouse in

## ist you can swat the pests

rescued known to experts in the field. Three times the cattle have been sprayed from an airplane flown by Bob Ellison, Torrington air service owner. The rest of the time, Spackman, Lloyd and Hulett have sprayed on the ground.

The Talbott's 300-plus head of cows and calves have been divided into five herds and put into five separate pastures. Four of the herds are sprayed; the "check" herd is not. The team has tried spraying the animals and also the pastures. The cattle seemingly get some relief from the dive-bombing pests but the project demands constant operation to be effective.

As we drove through the wet pastures, the mosquitoes buzzed into the cab covering the windshield until it was hard to see. Jim Talbott said one of his neighbors had to stop his tractor recently to clean out the mosquitoes before the motor burned up.

As he expertly drove the old pickup through impossible places, Jim swatted his neck and laughed.

"You know, I hate those darned mosquitoes but I can't stand the mosquito dope — neither can dad. We are just lucky to guess that the stock can hold their own."

In answer to a question about the value of planting Gambusia, the mosquito-eating fish, Spackman explained that the fish require warm and relatively still waters to survive.

They are trying the Gambusia in Utah and Colorado as a supplemental measure to spraying but our Wyoming waters may limit the use of this kind of fish," Spackman said.

The Talbotts raise an inbred Hereford named a Bruce Arden, developed by the Big Boy Club back in 1925. Jim Talbott said the only animal is the rear

The spraying operation will continue throughout the summer as a pilot project when results will be studied. County Agent Hulett said he thought some of the ranchers might even try to lease land out of the mosquito area and run their cattle

there in an effort to "beat the B". Meanwhile, the Talbott family humored and philosophical delight, has adopted the slogan: "Family That Sprays Together."



# **PRIVATE PROPERTY TAKINGS UNDER WETLANDS DESIGNATION**

**PREPARED FOR THE COMMITTEE ON RESOURCES  
UNITED STATES HOUSE OF REPRESENTATIVES  
JULY 17, 1995**

**Testimony by Tom Rule**

**Buffalo Land and Cattle**

**P.O. Box 473**

**Buffalo, Wyoming 82834**

**Phone: (307) 684 - 7820**



Aerial photo (Fall, 1994) of "irrigation-induced" wetlands on Rule Ranch east of Buffalo, Wyoming. The dark brown area in center of photo are cattails which make up the core area of this swamp, i.e. wetlands. The lighter brown area adjacent to the core area (cattails) is the land that is water saturated and useless, also. Consequently, the area adversely affected by water saturation is approximately twice the area of the cattails. A useable hay meadow can be seen on left side of photo (near small gravel road).



Photo (Summer, 1995) of same swamp (wetlands) as above. Dark green area is cattails — the core area of the wetlands. To the upper left baled hay can be seen on what's left of this once productive hay meadow.

## BUFFALO LAND &amp; CATTLE

**TO: U.S. COMMITTEE ON RESOURCES****FROM: TOM RULE**

P.O. Box 473

Buffalo, WY 82734

**REF: SUMMARY OF WRITTEN TESTIMONY CONCERNING PRIVATE PROPERTY TAKINGS UNDER WETLANDS DESIGNATION**

My name is Tom Rule. I'm a third generation rancher and we own a 2,132 acre ranch located about 2 miles east of Buffalo, Wyoming. Over half of this ranch is productive farmland which has been flood irrigated since the late 1800s.

Let me sum up the "takings" of my private property: Our hay meadows are flood irrigated. Man-made irrigation ditches were built, commencing in 1883, to bring water to the ranch for irrigation. Due to the gradual slope on my meadows, water tends to stand and not run off properly. Consequently, a drainage ditch or channel was dredged through these meadows to facilitate proper run off. That drainage ditch has not been maintained since the 1960s. As a result, a swamp area or "wetlands" has greatly increased and continues to increase. To halt the loss of my productive farmland, the drainage ditch or channel must be re-dredged. But the government says, "**NO!**"

When I refer to "owning" this ranch, I use the term only to mean that we are paying off the mortgage and are required to pay taxes on this deeded land year after year.

The truth of the matter is: **The federal government is part owner too!** They are stealing at least 300 acres of my land via regulation. The Army Corps of Engineers has defined those 300 acres as a "natural" wetlands/swamp. (I use the term "swamp" because it's a more accurate description.) The designation "natural" means I can't do anything with this land except watch more and more of my most productive hayland become soured with water saturation and turn to wasteland. So as a result of the incredible power given to federal bureaucrats, who apparently answer to no one, I'm being told what I can and cannot do on my land. **Such regulatory power makes the federal government a "defacto" landlord.**

Don't get me wrong, I'm not anti-government. I realize the need and purpose of government, but in my case, they've stepped way beyond their rightful authority.

This swamp on my property is "irrigation-induced." You don't have to take my word for it, you can take the government's word for it. The Soil Conservation Service has also stated this swamp is an "irrigation-induced" wetlands.

## BUFFALO LAND &amp; CATTLE

"Irrigation-induced" means I can go in and clean out the drainage ditch or channel, as the Soil Conservation Service calls it, so that water drains properly from my land. "Natural" means I can't do anything.

In documentation provided with my written testimony are letters, one from Phil Gonzales, current District Conservationist, and one from Wallace Hoskins, Resource Conservationist, who state their information shows the wetlands/swamp on my deeded property are "irrigation-induced" wetlands.

However, the final authority on wetlands/swamp lies with the Army Corps of Engineers. I applied for a permit exemption. ("Irrigation-induced" wetlands/swamp, under normal farming activities, are exempted from Section 404 of the Clean Water Act.) I was refused. Why? Chandler Peter of the Army Corps of Engineers stated it was a "natural draw," not an "irrigation-induced" wetlands, meaning I would be required to apply for a Section 404 permit under the Clean Water Act.

If you will read Mr. Peter's letter carefully, you will see there is incredible expense in pursuing a permit under Section 404 of the Clean Water Act. This permit includes vegetation, soils and hydrology studies by professional consultants, detailed maps of the wetlands/swamp (aerial photos aren't even good enough), contact and consultation with other federal agencies, and mitigation — creating, restoring or enhancing other wetlands/swamp to offset wetlands impacts on my ranch. All this expense is just preparation for qualification for a Section 404 permit. I could go through all this expense and still be turned down!

I conclude by saying emphatically that the federal government has "taken" without compensation more than 300 acres of my land. Please note that the last portion of Amendment V of the U.S. Constitution says "... **nor shall private property be taken for public use without just compensation.**" Federal regulations violate the Supreme Law of the Land, the U.S. Constitution, whenever they tell me or anyone else who owns private property what we can and cannot do on our own private land!

It's interesting to note that there's not even a public use of this wetlands/swamp on my ranch. Chandler Peter came to see my swamp one day and told me it was poorest quality because "nothing would live in it." **Yet, I can't touch this holy ground!**

Thank You.

## BUFFALO LAND &amp; CATTLE

**TO: U.S. House Committee on Resources**

**FROM:** Tom Rule

**REF:** PRIVATE PROPERTY TAKING UNDER WETLANDS DESIGNATION

**Testimony of:**

Tom Rule  
BUFFALO LAND & CATTLE  
Box 473  
Buffalo, WY 82834  
(307) 684 - 7820

My name is Tom Rule. I'm a third generation rancher. My family has ranched in the states of Colorado and Wyoming since 1914. We currently own a ranch, purchased in 1989, consisting of 2,132 acres. This ranch is located 2 miles east of Buffalo, Wyoming. Of the 2,132 acres, approximately 1,527 acres are productive farmland. This includes a man-made wetlands/swamp ("swamp" is a more accurate term) which is approximately 300 acres.

My productive farmland cuts 5 ton of hay per acre annually. If the estimated 300 acres, which currently stands useless in the man-made wetlands/swamp, were in production, it would cut 1,500 ton of hay per year. Hay in this area sells from \$70 to \$100 per ton. Figuring \$65 per ton and 5 ton per acre, the loss of the estimated 300 acres which is in the man-made wetlands/swamp, is \$97,500 annually. Consequently, I've lost a gross of \$585,000. With production costs (\$35 per ton) subtracted, my actual annual loss \$45,000. My total actual loss is \$270,000 in the six years I've owned this land.

Bear in mind, this wetlands/swamp continues to grow all the time. According to the Soil Conservation Service: in 1935, there were 64.5 acres of wetlands, in 1980, 127.2 acres of wetlands and from 1990 to 1994, the area of cattails increased more than 40 acres. Obviously, when the irrigation ditches were first built, they probably didn't give much thought that they would create a wetlands/swamp, nor did their limited horse-drawn equipment allow them to do totally effective maintenance. But most importantly is the fact that between the years of 1990 to 1994 the wetlands/swamp increased by one third!

Point of clarification: Cattails are the core area of a wetlands/swamp. This is what the Soil Conservation Service uses to measure wetlands/swamp. The Environmental Protection Agency (EPA) and the Army Corps of Engineers use a much broader definition which greatly increases the acreage considered wetlands/swamp. For example, on July 25, 1994,

## BUFFALO LAND &amp; CATTLE

Chandler Peter, Project Manager, Regulatory Office in Cheyenne, Wyoming, Army Corps of Engineers (Omaha District) came to view this man-made wetlands/swamp. Approximately 250 feet from the cattails, Mr. Chandler dug in my hay meadow and, after looking at the soil and vegetation, stated, "By our definition, this soil would qualify as a wetlands." Thus, an increase in cattails is a relatively small portion of the total acreage lost to this increasing wetlands/swamp.

I must emphasize that this wetlands/swamp is man-made. It is a result of irrigation being brought onto this ranch and failure of proper runoff after irrigating the meadows.

Irrigation ditches were dug here commencing in 1883. In addition to the irrigation ditches, a drainage ditch, i.e. channel, was cut in my hay meadows so that the run-off or return flow would flow back into Clear Creek which is located north of my property. Kenneth Buxton, Jim Guyton and others who have lived here since the 1950s all recall this drainage ditch being dredged periodically.

When Exxon bought the property in the mid 1960s, they had no interest in the surface, but rather the thick coal vein underneath this ranch. Exxon leased the ranch out and the lease holders failed to maintain the ditch. Thus, no necessary maintenance of the drainage ditch occurred from the mid 1960s to 1989. This increased the size of the wetlands/swamp greatly.

This drainage ditch was necessary because my hay meadows have a gradual slope. Irrigation water tends to stand on them. Thus, the drainage ditch/channel was dug to facilitate proper runoff and return flow.

In order for a drainage ditch to function properly, it needs yearly maintenance. As already stated, the drainage ditch was not properly maintained for almost 30 years. Consequently, more and more land became wetlands/swamp or swamp.

We need to go in and clean out that ditch so the water will flow off our land. However, due to the current wetlands regulations, I cannot do the necessary maintenance on the drainage ditch. So I must watch, year after year, more and more of my most productive land become a wasteland, all because of federal regulations.

I have taken considerable time and effort to work with various federal and state agencies in hopes of correcting this man-made wetlands/swamp problem. Here is a summary of the steps I've taken:

1. Shortly after purchase of this ranch, I went to the Soil Conservation Service and asked what could be done with the wetlands/swamp. I got the impression that "drainage" was out of the question due to possible "loss" of wetlands/swamp and the conflict of definitions between the Soil Conservation Service and the Army Corps of Engineers and EPA. So we discussed a combination of drainage and developing for waterfowl habitat. They suggested I contact waterfowl biologist, Bruce Johnson, who worked for the Wyoming Game and Fish Department (WYG&F). Mr. Johnson had been in contact with Exxon discussing

## BUFFALO LAND &amp; CATTLE

the development of waterfowl habitat. According to the study Mr. Johnson did, he offered two plans, but neither were feasible due to the high cost associated with development and low return to WYG&F.

2. Since 1990, I've repeatedly asked the Soil Conservation Service to assist me with this man-made swamp. (We've discussed this issue at least 15 to 20 times.) I've been refused, not because the Soil Conservation Service didn't want to assist, but because of the vagueness of definitions on wetlands/swamp. It's my personal feeling the Soil Conservation Service would allow me to clean and maintain the drainage ditch, but their hands are tied. Here are some examples:

A. Wally Hoskins, Resource Conservationist with the Soil Conservation Service, came out to my property, examined the wetlands/swamp, and agreed with me that the drainage ditch should be cleaned and maintained. He gave me permission to proceed with cleaning the ditch.

He gave me the name of a man from South Dakota who would come in and clean the ditch. I contacted the man in South Dakota and he quoted me a price of \$10,000 for cleaning the ditch. I called the Soil Conservation Office to tell them about the quote and that I was proceeding. Phil Gonzales, District Conservationist, told me I could not proceed as they had received orders from their superiors recinding my permission to clean and maintain the drainage ditch.

B. The Soil Conservation Service has worked hard for me to mitigate wetlands in this region so as to allow me to clean and maintain the drainage ditch. They have hit a dead end every time.

**NOTE:** I had a short segment of the lower drainage ditch cleaned in 1993. This portion had been cleaned just a few years previous. I was turned in to the Army Corps of Engineers who, in turn, contacted the Soil Conservation Service who contacted me and ordered me to stop.

3. In 1994, after repeated failed efforts with the Soil Conservation Service, I contacted the Army Corps of Engineers directly asking for an exemption in order to clean and maintain the drainage ditch. Again I was refused. They stated the area was a "natural" drainage and could not be ditched. Please note I submitted an aerial photo which clearly showed portions of the drainage ditch. It made no difference, I was still refused permission to clean and maintain the drainage ditch.

Since the refusal to clean and maintain the drainage ditch, I've begun the process of changing from flood irrigation to use of a sprinkler system. This is in hopes of reducing water flow to the wetlands/swamp area, thus retarding the growth of the man-made wetlands/swamp. This is a very costly investment for me. I estimate the cost of putting this ranch under a sprinkler system at more than \$400,000. (The first phase will cost \$140,041 for a 345 acre system.) This figure does not include the annual cost of \$20,000 to \$25,000 to operate all the sprinkler systems.

## BUFFALO LAND &amp; CATTLE

The bottom line is this: Due to vagueness of a wetlands definition and excessive regulations of my private property, I am losing 300 acres of my most productive land. My total dollar loss, to date, is \$670,000 (actual production losses and changeover and utilization of a irrigation sprinkler system). And I will continue to lose more of my productive land due to government regulations. This is a "taking" of my private property!

If I were to exert what I believe to be my constitutional rights on my private property and cleaned and maintained that drainage ditch, I could be fined up to \$25,000 per day (violation of Section 404 of the Clean Water Act). Needless to say, I'd be out of business and lose this ranch — my livelihood — in short manner with such outrageous fines.

Where in the United States Constitution does it say that federal bureaucrats can tell me what I can and cannot do on my private property without compensating me for all losses incurred by their regulations?

## ISSUES WHICH MUST BE ADDRESSED

1. There must be a clarification of what the Clean Water Act regulates. It's my understanding "waters of the U.S." dealt with navigable waters. It was court rulings that expanded the definition to include all waters within the U.S., including all wetlands. If this is the case, it's time to reverse judicial activism and let Congress define, very precisely I might add, what the federal government can and should regulate.

2. The federal government should be allowed to protect wetlands on public lands only, not private property. The U.S. Constitution guarantees and protects private property rights. To allow federal bureaucrats to regulate wetlands on private property is a violation of the U.S. Constitution. Such regulation is usurpation of my private property rights, making the federal government a "defacto" landlord.

3. Give any necessary, limited regulatory authority to the government agency closest to the people. I refer here to the conflict between the Soil Conservation Service and the Army Corps of Engineers and the EPA. The Soil Conservation Service is the agency with the data and history of this ranch and thus have a much better understanding of what should or should not be done. If they had authority, I wouldn't have to appeal to the U.S. Congress. We would have cleaned and maintained that drainage ditch years ago. (I find it amazing that the U.S. Department of Defense, i.e. Army Corps of Engineers, have nothing better or more important to do than to shoot orders over a swamp on my private property.)

Please understand, I'm reluctant to suggest any authority be given to any federal agency. I would prefer the state or even the county to handle such problems. I believe that's the way our Forefathers intended. But if a federal agency must have regulatory authority, give it to the agency that works closest with the people.

## BUFFALO LAND &amp; CATTLE

**4. Federal bureaucrats must be held personally accountable for their actions.** If I were to take action that would cause harm to my neighbor, I could be held liable and rightfully so. That's the way it should be with federal regulators. There must be a "checks and balances" whereby they must answer for their decisions.

**Thank You!**

### Attachment List

1. Letter (dated 1 December 1989) to Roger Wilson from Bruce Johnson regarding creating waterfowl habitat on part of the man-made wetlands/swamp.
2. Wyoming Game and Fish Biologist, Bruce Johnson's two studies for developing waterfowl habitat on the man-made wetlands/swamp.
3. Letter (dated 17 April 1990) to Roger Wilson from Bruce Johnson concerning a Section 404 permit on man-made wetlands.
4. Letter (dated July 19, 1990) to Tom Rule from Phil Gonzales, District Conservationist, Soil Conservation Service, outlining the increase of acreage in wetlands/swamp and verification of a drainage ditch, i.e. channel, even in 1968 when it was closing up. This letter also verifies that the wetlands/swamp is an "irrigation-induced" wetlands not a "natural draw" as claimed by Chandler Peter of the Army Corps of Engineers.
5. Tom Rule's letter to Army Corps of Engineers seeking an exemption to clean the drainage ditch/channel. Also attached is a letter from Wallace Hoskins, Soil Conservation Service, stating the wetlands/swamp are "irrigation-induced," and recommending the cleaning of the channel, i.e. drainage ditch, advising Tom to contact the Army Corps of Engineers directly. Soil Conservation Service work accompanies Hoskins' letter.
6. Chandler Peter's letter to Tom Rule refusing to allow cleaning and maintenance of the drainage ditch. Note in this letter, Peter states the area is a "natural draw" even though Hoskin's letter, which accompanied with Rule's exemption request, stated the wetlands/swamp were "irrigation-induced" and that the old channel, i.e. drainage ditch, needed to be cleaned.
7. Letters signed by Kenneth Buxton and Jim Guyton verifying their knowledge of a drainage ditch being cleaned and maintained on Rule ranch property.

Attachment #1

1 December 1989

TO: Roger Wilson, Coordinator  
 FROM: Bruce Johnson, Biologist *BW*  
 SUBJECT: Buffalo Duck Ponds  
 COPIES: Rick Pallister, Tom Rule

I met with Tom Rule yesterday to discuss developing the cattail marsh on his property into waterfowl nesting and broodrearing habitat. I explained the history of the project and showed him contour maps and some plans for developing waterfowl habitat. Tom then explained to me his plans for his ranch and what he would like to see developed.

Tom has 2 major concerns with water management on his property. The cattails appear to be raising the water table to the point where salts are coming to the surface in fields on the north end of his property. Any activity we propose must not raise but lower the water table and result in fewer acres of cattails.

Tom proposed the following option. He was in favor of a 30 to 40 acre marsh/wetland complex, involving 1 dike. This dike would be located at about the 93 foot contour level where the cattail marsh is the narrowest. He wants the marsh below that dike drained to move the water out of that area. He feels that this will then lower the water table on the portion of his ranch where he is having problems with salts coming to the surface. He also wants the cattail marsh above the proposed dike drained for the same reason. The 2 areas are each about 50 acres in size. He also wants a headgate installed on the dike to capture waste water and move it onto another field. This would not interfere with the level of water in the pond.

Tom did not want to sell the marsh. He was willing to consider a lease concerning managing the pond for waterfowl, but he did not want a lease that involved hunting. He did not know if fencing the pond was a good idea, because of the maintenance problems with a fence in a marsh. Tom also stressed that the water was almost entirely waste water from irrigation, and that DU should be made aware of this fact.

It appears to me that this project involves trading 150 acres of cattails with virtually no open water for about 30-40 acres of marsh with a mix of open water, islands, and cattails. Tom will get more grazing pasture, water for an irrigation project, and a solution to a salt problem for developing waterfowl habitat. Based on the cost estimates for the original project made by the SCS in 1987, the cost of this project should be less than \$20,000, excluding the channelization.

We need to answer a couple of questions before we go any further with this project. 1) What will happen to the water table with this project; and 2) will DU or the Department want to participate in a program to drain a cattail marsh? The Department may be in conflict with the Swampbuster Law passed recently. We may be able to get answers to some of these questions at the HATS meeting in Lovell on the 13th.

Attachment #2

5 April 1990

Tom:

I put together some cost estimates for developing a wetland on your property. I used the constraints that you asked for when we met earlier, and they were:

- no enlargement of the wetland;
- confine development to the south end of the marsh;
- drain the area north of the development;
- no dike construction; and
- access for administrative use only.

Plan 1

I designed a project that would create an island about the length of the pond. Dirt would be moved to the island, and a spoil bank would be created on the outside edge of the pond, too. A back hoe would be used to do the dirt work, and I estimated that it could reach 25' effectively. There is no feasible way to construct a pond the length of the area we identified, because of the gradient. The upper end would either be dry, or a large amount of dirt would have to be moved to create open water. There is about a 5' drop, and if we want water to be about 4' deep, a trench about 9' deep would need to be dug. Unfortunately, ducks do not use areas with deep side cuts very well, so the sides would need to be contoured with a dozer.

plan 2

So, I went back to plans drawn up by the SCS in April 1987, utilizing ditching on contours. We had identified 3 areas where we could dig ponds on the contour. We could create 2 ponds with a total surface area of 2.6 acres. The ponds would have islands in them, derived from spoil material. Cost of the trench excavation would be about \$20,000. If we tried to construct a pond as outlined in the first paragraph, the cost would be about \$55,000.

I estimated that the cost to drain the rest of the marsh at about \$4,500 for plan 1 and \$5,000 for plan 2. The ditch would be about 2850' to 3125' long, 4' deep and 6' wide. Cost to move dirt was estimated at \$1.80/yd, and it was based on the SCS estimated cost.

Both plans would produce about the same amount of waterfowl, because both have about 2.6 acres of open water with islands. Ideal ratio of island: open water is about 5:100, and this project would produce ratios of 1:1. I used information Bert Jellison provided me on the expected production and harvest of ducks and geese on a project of this size. About .7 ducks are harvested per acre of wetland, with a benefit to the economy of \$18.23/acre or \$50/year. About 1 pair of geese could be expected to nest there. The amount of open water is at

the lower end of what geese appear to need. About 1.4 geese would be harvested annually from birds produced on the pond, and this is about \$90 for the state. The total return is about \$140/year.

As you can see, the cost:benefit ratio is really high.

Plan 1 - \$55,000/\$140/year = 392 years

Plan 2 - \$25,000/\$140/year = 178 years

My figures are fairly conservative on the cost estimates, so the cost:benefit ratio may be even lower when we continue with engineered drawings.

I do not think this project will be funded by the Department, given the high costs. The area does have great potential as waterfowl habitat. If you ever want to sell it or trade it for other property, the Department would certainly be interested in working out an agreement with you.

When Bert and I left your place, we stopped and looked at the area, again. We can come up with a more favorable cost:benefit ratio by draining the upper portion, and constructing a small pond at the very lower end, as was drawn in the 1987 SCS plans. That 1 pond would cost about \$11,000 to construct. Cost of ditching the area would be about the same. Fencing would cost about \$3000. Because more open water would be created, more ducks and geese would be produced. Also, that pond is right next to the road. A viewing area could be constructed allowing people to see the marsh and the birds there adjacent to the road. Access to the pond could still be controlled, but I feel a single parking area would provide for nonconsumptive values, thus increasing the return to the Department.

Benefits would be about \$437 for ducks. The increased size of the pond makes the island much more productive. About 4 pair of geese could be expected on the pond because of the island, and about \$356 in benefits would be obtained. The cost:benefit ratio is \$19,000: \$793/year or 24 years for the waterfowl production alone. With nonconsumptive values included, the cost:benefit ratio improves. Based on figures supplied by the U. S. Fish and Wildlife Service, a nonconsumptive user day is \$33.00. I do not know how many people would stop and look at birds at that site, but 100 people seems reasonably conservative. Using \$3,300 annually from nonconsumptive values, the cost:benefit ratio is \$19,000:4,093 or the project breaks even in about 5 years. Remember, this is for the economy, and not the break even point for the Department. That point would be many years from now, because the Department does not sell many licenses to waterfowl hunters and derives no money from nonconsumptive users of wildlife.

Thanks for your cooperation and patience on this project.

17 April 1990

Attachment #3

TO: Roger Wilson, Coordinator  
 FROM: Bruce Johnson, Biologist *Bruce*  
 SUBJECT: 404 Permit for Buffalo Duck Ponds  
 COPIES: Rick Pallister, Tom Rule ✓

I contacted Dennis Blinkhorn, U. S. Army Corps of Engineers, to find out information about getting a 404 Permit to drain part of the cattail marsh on Tom Rule's property. The Corps has jurisdiction over waste waters on private lands once the water leaves the fields. Within the last 6 weeks, the Corps signed an MOU with the EPA regarding wetland drainage. They now subscribe to the policy of "No net loss". We must show no net functional loss in wetland benefits. Creating open water is 1 benefit. Other benefits include flood water retention, water quality, erosion control, and ground water recharge.

Our plan was to drain about 60 acres of the marsh and create up to 14 acres of open water on another portion of the cattail marsh. Because we proposed to enhance 14 acres--going from cattail marsh to open water, we were not creating any wetlands. Under their policy, when you enhance 2 acres of wetlands, you can destroy 1 acre. If you create 1 acre, you can destroy 1 acre. Consequently, we could destroy about 7 acres of wetlands. Unless we can work out a trade and show where we are creating more wetlands some other place, we will not be able to get a 404 permit for the project as proposed. One possible source of wetlands to trade would be the old sewage lagoon. If we can get that project implemented, we will create about 20 acres of wetlands within the current dikes. We could use that 20 acres to offset losses of wetlands on Tom's property. I do not know if the Corps would accept 20 acres of new wetlands for the loss of 53 acres of cattails.

I talked to Art Anderson, USFWS, about getting funding for this project. He is the broker for Colorado and Wyoming for the FWS to distribute \$60,000 to develop wetlands on private or state lands. He needs projects by July 15 for this money, and he'll have more money available next year. If we can identify areas where we can develop wetlands, this is a ready source of money. He said there were not many projects, so most would have a good chance of getting funded.

United States  
Department Of  
Agriculture

Soil  
Conservation  
Service

760 West Fetterman  
Buffalo, Wyoming  
82834

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Date: July 19, 1990

Subject: Rule Wetland

To: Tom Rule

Estimates were made by John Lawrence and Phil Gonzales of the SCS with the use of aerial photos of ASCS and SCS and contact with individuals familiar with the area.

In 1939, the channel can be identified with the majority of wet conditions being along the channel and below the upper canal that goes along the top of the wet area.

The channel itself at the very top of the wet area looks like the delivery system to the lower fields.

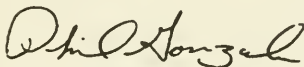
In 1954, there is 94.9 acres of the same type of situation with the channel being evident with wet conditions adjacent and below the canals.

In 1968, the channel seems to be closing up and is not as evident within the area, now estimated to be 97.5 acres.

The latest photo we have is 1980 with the area appearing to be 127.2 acres. There is no evident of the channel other than below the wet area.

Others have indicated that as early as the 1930's there is only runoff during irrigation. This area has been irrigated since the 1800's.

From information gathered, this area is an irrigation induced wetland.



Phil Gonzales  
District Conservationist

Attachment #4

TO: Matt Bilodaue

Attachment  
#5

Dear Matt!

I have been informed by the Soil Conservation Service to request your approval on any work which has been identified by the Soil Conservation Service as Irrigation Induced Wetlands on my ranch. I ask the Soil Conservation Service to put together some information on the area of my ranch that is being taken out of production because of seepage from irrigation canals and past irrigation practices. I have enclosed all of the information that was furnished to me by the Soil Conservation Service. I hope this information will be sufficient to allow you to make a decision in allowing me to proceed with maintaining my irrigation systems.

According to the information that the Soil Conservation Service furnished to me in 1990 they identified that there was approximately 127 acres of irrigation induced wetlands on my ranch. There is approximately 150 additional acreage that I still have along side of this irrigation induced wetland, but it is becoming more difficult to maintain and control my irrigation systems on these fields. I would like to receive permission to clean all irrigation ditches that have been established in the past. This would include cleaning of the main irrigation channel identified on the attached maps. This channel is the only method of delivering irrigation water to lands below my ranch and requires me to allow water to be diverted through this clogged channel and is causing an increase of wet areas in my fields.

I am proposing to either clean these old irrigation channels and ditches with a track backhoe or by contracting a blasting expert to open the main irrigation channel to its original depth of about 4 feet and approximately 8000 feet long. There would also be about 4000 feet of old irrigation ditches that would be cleaned to about 2 feet deep and most of these would be cleaned with either a ditcher or a small backhoe. This work would take place in Section 6, Township 50 North, Range 81 West and in Section 31, Township 51 North, Range 81 West.

I have reviewed the typical cross section proposal that was prepared by the Soil Conservation Service and feel that this size of ditch would be adequate to carry my waste water off my fields and also deliver water to other lands below my ranch. I notice that the calculations prepared by Wally Hoskins show that I would not be draining or effecting more than 8 acres and that I will never be able to drain much of this area by doing this work. I would like to request that you allow me to proceed with this project and that this action be exempted from the requirement of a permit. I will furnish you with a set of plans if needed to meet your requirements.

Please communicate your comments to me as soon as possible. Send all correspondence to Tom Rule PO. box 473 Buffalo, WY. 82834.

Thanks!

Tom Rule

United States  
Department of  
Agriculture

Soil  
Conservation  
Service

760 West Fetterman  
Buffalo, Wyoming

Date: 5/20/94

SUBJECT: 404 PERMIT INFORMATION

TO: TOM RULE

This information was prepared as requested by Wally Hoskins of the Soil Conservation Service to assist you to secure any required permits for proposed work that may involve construction work around or near areas identified by the Soil Conservation Service as Irrigation Induced Wetlands.

I have prepared two 6 inches equal to one mile scale maps outlining the areas that are being effected by a high water table. These maps are copies of aerial photographs taken in 1939 and in 1980, with the identified irrigation induced wetlands identified in 1990. Also attached is a topographic map showing legal water righted irrigated lands and certificates of appropriation for these lands.

It is your responsibility to submit information to the Corps of Army Engineers before beginning any work that may effect wetlands.

#### BACKGROUND RESOURCE INFORMATION:

The entire effected area was water righted and irrigated under a territorial water right of 1884. Refer to attached topo map for area water righted with attached certificates of appropriation.

I have made copies of photographic coverage of the irrigated cropland and identified the area that has been effected by past irrigation canal seepage and poor irrigation water management by previous owners. One of these maps show the area effected in 1939, which was approximately 40 acres. This 1939 map also identifies irrigation canals, irrigation delivery ditches, diversions and irrigated cropland that existed in 1939. The 1980 map shows area effected, irrigation induced wetlands, irrigation channels and irrigated cropland in 1974. There is approximately 127 acres of irrigation induced wetland identified in 1990 by the Soil Conservation Service. The area effected has increased since 1939 and much of the productive cropland has been converted to either grass hayland, pastureland or wetland and may continue to lose productivity unless the main irrigation channel is restored to the original grade and size. The main irrigation channel is used to deliver water to your lands as well as to other irrigated lands below your ranch.

The Irrigation Induced wetland were identified to contain 127 acres. Refer to attached map and FSA Manual definition of Irrigation induced wetland. Aerial photographic coverage indicates that these lands were not wetlands prior to the development of irrigation of these lands. Approximately 700 acres above this area have been irrigated for over a hundred years and may have contributed to the development of some of this cropland into wet areas.

I have included a soils map which identifies the wetland area and the soil symbol is 510 and the soil name is Worthenton. I have also included the soil descriptions and a copy of the form 5 with the technical information. After our meeting with Chandler Peter, I agreed to calculate the area that would be effected by the proposed work. This would involve cleaning approximately 8000 feet of the old main channel about 4 feet deep and 4 feet wide at the bottom. This calculated to effect 7.35 acres of the existing irrigation induced wetland. Refer to attachment. The area effected by cleaning old irrigation waste ditches would effect a strip 6 feet wide and approximately 4000 feet long and would be 2 feet deep and would effect about 0.5 acres. Chandler also said that you may consider obtaining personal letters from old owners or employees about work that has been done over the years to clean or maintain these old ditches and structures.

Tom; I hope this resource information will assist you and I would recommend that you contact Matt Bilodaue with the Corps of Engineers to obtain any required permits before you begin any construction. The address that you should send any correspondence to is.

Matt Bilodaue  
Regulatory Office  
Corps of Engineers  
504 West 17th Street  
Cheyenne, WY. 82601  
Phone 772-2300

*Wally*  
Wallace Hoskins  
Resource Conservationist

Wyoming Tom Rule Wetland - Effected Area.  
 We 5/17/94  
 NEM Section 16 Chap 4 Subsurface drainage 1

These calculations are based on the Ellipse equation in the SCS National Engineering Manual

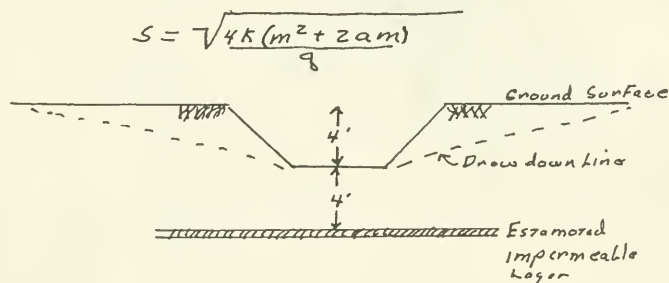
$$S = \sqrt{\frac{4K(m^2 + zam)}{g}}$$

Soil Name - WORTHINGTON Refer to attached Form "5"

Soil Symbol - 510

Permeability 0.06 - 0.2

Typical Cross Section of proposed drain ditch



$S$  = Area effected by drow down

$K$  = Average hydraulic conductivity -- in./hr. = 0.13

$m$  = vertical depth of ditch = 4 Ft.

$a$  = Estimated depth to impermeable layer below drain = 4 Ft.

$g$  = Soil drainage coefficient -- in./hr. =  $\frac{3}{8}$  in/day = 0.0156 in/hr.

$c$  = Surface desired drow down. = 0

Wyoming  
WS

Torr Rule Wet/ord. Effected Area.

2

$$S = \sqrt{\frac{4K(m^2 + 2am)}{8}}$$

$$S = \sqrt{\frac{(4)(0.13)[4^2 + (2)(4)(4)]}{0.0156}}$$

$$S = \sqrt{\frac{(0.52)(48)}{0.0156}}$$

$$S = \sqrt{\frac{24.96}{0.0156}}$$

$$S = \sqrt{1600}$$

$$S = 40 \text{ Feet.}$$

Length of proposed ditch cleaning on main  
is 8000 Ft.

Calculate Total Area Effected by cleaning  
of main canal.

Length 8000 Ft

Drowdown area Effected = 40 Ft.

$$\text{Area} = \frac{8000 \times 40}{43560}$$

$$\text{Area} = 7.35 \text{ Acres}$$



WORTHINGTON SERIES

THE MORTWATER SERIES CONSISTS OF DEEP, POORLY DRAINED SOIL THAT FORMED IN CLAYEY ALLUVIUM ON FLOODPLAINS AND OXBOWS. EFFICIENTLY, THE SURFACE LAYER IS COVERED WITH ORGANIC MATTER ABOUT 2 INCHES THICK OVER GRAY CLAY LOAM ABOUT 3 INCHES THICK. THE SUBSOIL IS GRAY CLAY ABOUT 31 INCHES THICK. THE SUBSTRATUM IS GREENISH GRAY CLAY LOAM. MAP IS 12 TO 15 INCHES. MAT IS ABOUT 45 DEGREES F. FFS IS ABOUT 120 DAYS. SLOPES ARE 0 TO 3 PERCENT.

ESTIMATED SOIL PERMEATICS									
SY. UNIT	USCS TEXTURE	UNIFIED	ASNTD	IP3 IN. THIN 3" PASSING SIEVE NO.	LIQUID PLAS.	PLASTICITY	LIQUID PLAS.	PLASTICITY	LIQUID PLAS.
(IN.)				(%)	(%)	(%)	(%)	(%)	(%)
0-5 ICL. SICL	ICL	1-2-6, A-T		0	100	95-100	85-95	35-45	115-25
5-10 ICL. SICL	ICL	1-2-6		0	100	95-100	85-95	35-45	115-25
10-15 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
15-20 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
20-25 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
25-30 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
30-35 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
35-40 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
40-45 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
45-50 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
50-55 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
55-60 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
60-65 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
65-70 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
70-75 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
75-80 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
80-85 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
85-90 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
90-95 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
95-100 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
100-105 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
105-110 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
110-115 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
115-120 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
120-125 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
125-130 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
130-135 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
135-140 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
140-145 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
145-150 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
150-155 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
155-160 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
160-165 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
165-170 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
170-175 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
175-180 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
180-185 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
185-190 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
190-195 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
195-200 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
200-205 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
205-210 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
210-215 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
215-220 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
220-225 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
225-230 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
230-235 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
235-240 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
240-245 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
245-250 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
250-255 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
255-260 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
260-265 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
265-270 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
270-275 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
275-280 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
280-285 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
285-290 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
290-295 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
295-300 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
300-305 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
305-310 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
310-315 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
315-320 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
320-325 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
325-330 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
330-335 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
335-340 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
340-345 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
345-350 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
350-355 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
355-360 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
360-365 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
365-370 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
370-375 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
375-380 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
380-385 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
385-390 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
390-395 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
395-400 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
400-405 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
405-410 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
410-415 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
415-420 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
420-425 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
425-430 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
430-435 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
435-440 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
440-445 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
445-450 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
450-455 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
455-460 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
460-465 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
465-470 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
470-475 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
475-480 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
480-485 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
485-490 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
490-495 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
495-500 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
500-505 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
505-510 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
510-515 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
515-520 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
520-525 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
525-530 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
530-535 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
535-540 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
540-545 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
545-550 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
550-555 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
555-560 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
560-565 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
565-570 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
570-575 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
575-580 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
580-585 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
585-590 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
590-595 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
595-600 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
600-605 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
605-610 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
610-615 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
615-620 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	115-25
620-625 ICL. SICL	ICL	1-2-7		0	100	95-100	85-95	35-45	

Subpart C - Wetland Exemptions, Mitigation, Restoration, and Replacement

SUBPART C - WETLAND EXEMPTIONS, MITIGATION, RESTORATION, AND REPLACEMENT

512.20(e)

512.20 Wetland exemptions.

Record the following wetland exemptions on Form SCS-CPA-026. Delineate these areas on the ASCS aerial photocopies and return the photos to ASCS with Form SCS-CPA-026. ASCS will outline these areas on their official maps. This process eliminates the need for persons to complete a new Form AD-1026 each year that maintenance is done on prior converted croplands or other exempted wetlands. Wetland exemptions include the following:

(a) Prior converted cropland (PC). A prior converted cropland is an area that was wetland that was manipulated before December 23, 1985, for the purpose, or to have the effect of, making the production of an agricultural commodity possible. The area is PC if production was not possible before the action, an agricultural commodity has been planted at least once, and the area has not been abandoned. PC's are exempt from FSA.

(b) Artificial wetlands (AW). An area is an artificial wetland if the area was formerly nonwetland or prior converted cropland, but now exhibits wetland characteristics because of human activities.

(c) Irrigation-induced wetlands (AW). An area is an irrigation-induced wetland if it was created by irrigation or seepage from an irrigation delivery system, but was nonwetland in its natural state.

(d) Wetlands (W) farmed under natural conditions. If the production of an agricultural commodity is possible on wetland as a result of a natural condition, such as drought, without the person destroying a natural wetland characteristic, label the wetland (W).

(e) Minimal effect (MW). Label the area MW if the production of an agricultural commodity on a converted wetland, in connection with all other similar actions in the area, would have minimal effect on the hydrological and biological functions of the wetland.

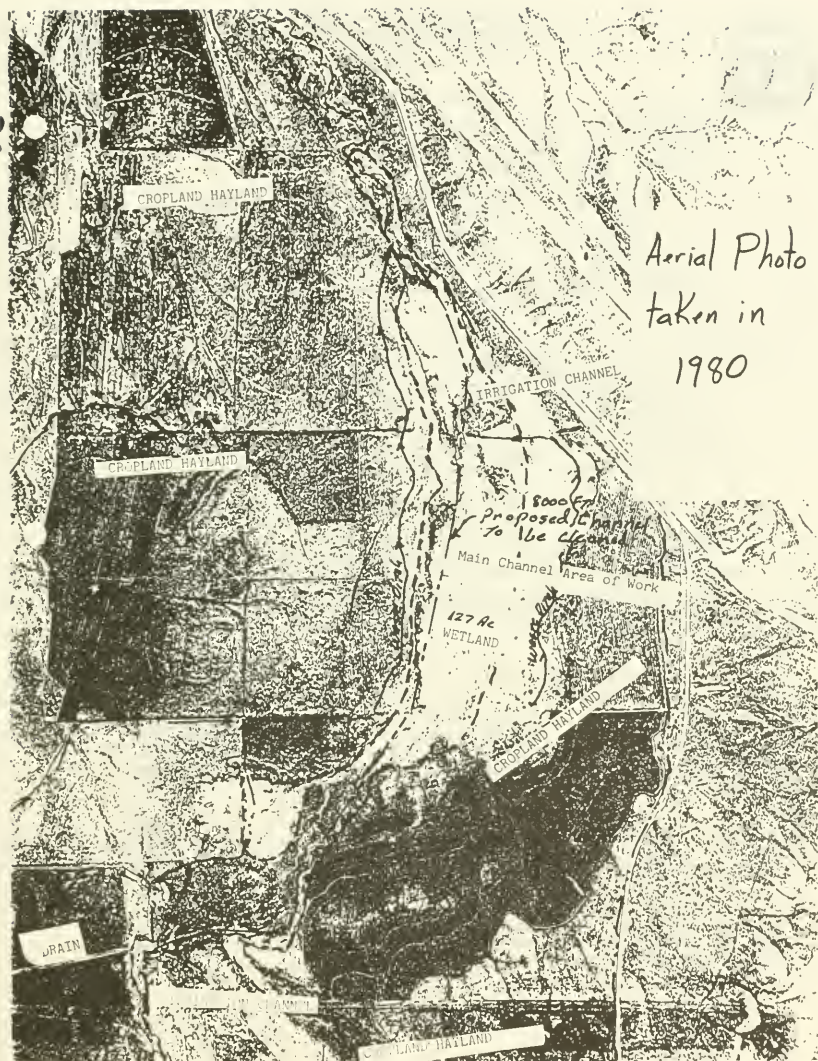
512-29

May 13 07:25 1994 tmp.pr Page 1

X3F NUNCHO VARIANT clay loam, 0 to 3 percent slopes -  
Typically, the surface layer is grayish brown loam about 9  
inches thick. The subsoil is brown clay about 10 inches  
thick. The substratum to a depth of 60 inches or more is  
mottled brown clay and clay loam.  
Dry--4w Irrigated--3w

(S10) WORTHINGTON clay loam, 0 to 3 percent slopes -  
Typically, Worthington is a deep poorly drained soil. It  
has a clay surface about 5 inches thick. The subsoil and  
substratum is clay to a depth of 60 inches or more. A  
fluctuating water table occurs near the surface most months  
of the year.  
Dryland--5w

S13 WOLF variant, saline, 0 to 6 percent slopes -  
Typically, Wolf variant, saline has a moderately to strongly  
saline, sandy clay loam surface about 7 inches thick. The  
subsoil is moderately to strongly saline, sandy clay loam  
about 9 inches thick. The substratum is gravelly sandy loam  
to a depth of 60 inches or more. In some areas these soils  
may have a fluctuating water table.  
Dryland--6s Irrigated--6s





DEPARTMENT OF THE ARMY  
CORPS OF ENGINEERS, OMAHA DISTRICT  
215 NORTH 17TH STREET  
OMAHA, NEBRASKA 68102-4978



September 12, 1994

REPLY TO  
ATTENTION OF

Cheyenne Regulatory Office  
2232 Dell Range Blvd., Suite 210  
Cheyenne, Wyoming 82009

Mr. Tom Rule  
P.O. Box 473  
Buffalo, Wyoming 82834

*Attachment  
#6*

Dear Mr. Rule:

This is in reference to your July 25, 1994 request for a determination of exemptability for the excavation of approximately 8,000 lineal feet of irrigation ditch/drain/natural draw on your ranch. You also requested the same determination for the excavation of 4,000 lineal feet of ditch as well. I regret the delay in responding to your request.

Based upon the information provided, it appears that you will be excavating a ditch in an area that is a natural draw as well as wetlands that are adjacent to that draw. I do not see any evidence in your submission that demonstrates the existence of an historic ditch. Additionally, your submission does not contain any evidence that maintenance activities of this type have occurred in the past at the proposed work location.

The work will result in the change in flow of the wetland system as well as reduce its reach. Since there is no evidence of preexisting maintenance or the establishment of an historical ditch, it also appears that you will be bringing waters of the U.S. into a use to which they weren't previously subject to. Therefore, your project is recaptured in accordance with 33 CFR part 323.4(c) and is not exempt from regulation.

Since the total impacts associated with the project are identified as approximately 7.85 acres, and the area is considered to be a headwaters area, you may apply for authorization in accordance with Nationwide Permit #26 which allows the impact of up to 10 acres of wetlands provided you follow Predischarge Notification (PDN) procedures. Please see the enclosed documents which outline the limitations of Nationwide Permit #26 and explain the PDN process.

Items you will need to include in your submission for the NW26 permit are:

1. A wetland delineation accomplished in accordance with the 1987 Corps of Engineers Wetland Delineation Manual. Data sheets containing vegetation, soils and hydrology must be provided. I have enclosed a list of consultants who perform this service. Some Soil Conservation Service personnel are experienced in this delineation protocol and may be able to assist you. The delineation needs to include an accurate map showing the limits of wetlands in the project area. Please be aware that the notations made on the 1980 aerial photo you submitted are not detailed enough for our purposes. The forthcoming map needs to clearly show the area of wetlands to be impacted by the proposal.

2. A statement that you have contacted the U.S. Fish and Wildlife Service and the State Historical Preservation Office about your proposal. Please see the enclosed information for their phone numbers and addresses.

3. A mitigation proposal. Due to the size of impacts to occur with the proposal, mitigation of impacts is required. This means you need to create, restore or enhance wetlands to offset project impacts. We typically look for an acre for acre proposal. You should consider working with the Wyoming Game and Fish Department and the U.S. Fish and Wildlife Service to design a mitigation proposal.

If you have any questions concerning this letter or the requirements of the 404 program, please contact me at (307) 772-2300. Be sure to reference File No. 199440248 in any future correspondence.

Sincerely,



Chandler J. Peter  
Project Manager  
Cheyenne Regulatory Office

Enclosures

Attachment  
#7

July 12, 1995

To: House Committee on Resources

From: Jim Guyton

REF: Drainage Ditch on Rule Ranch

## To Whom It May Concern:

I have personal experience with Tom Rule's ranch east of Buffalo. There has been a drainage ditch which used to be maintained so irrigation water would drain off the property. In recent years, there has been no maintenance of that drainage ditch. Consequently, a large area of swamp has developed on the property.

Signed: James C. GuytonAddress: Box 614  
BUFFALO WYO 82834

Phone: (307) 684 - 2478

Attachment  
#7

July 12, 1995

To: House Committee on Resources

From: <sup>Kenneth</sup> Charlie Buxton

REF: Drainage Ditch on Rule Ranch

## To Whom It May Concern:

I have personal experience with Tom Rule's ranch east of Buffalo. There has been a drainage ditch which used to be maintained so irrigation water would drain off the property. In recent years, there has been no maintenance of that drainage ditch. Consequently, a large area of swamp has developed on the property.

Signed: Kenneth BuxtonAddress: 165 North Carrington  
Buffalo

Phone: (307) 684 - 7324

TESTIMONY BEFORE THE TASK FORCE ON PRIVATE PROPERTY RIGHTS OF  
THE COMMITTEE ON RESOURCES OF  
THE U. S. HOUSE OF REPRESENTATIVES

Monday, July 17, 1995

Dr. David G. Cameron  
Professor Emeritus and Rancher

SUBJECT: Written submission by Dr. David Cameron to accompany oral testimony at the hearing of the Task Force on Private Property Rights of the Committee on Resources of the U. S. House of Representatives to be held Monday, July 17, 1995.

#### COMMITTEE MEMBERS AND VISITORS:

I speak today wearing two hats. I am a recently retired professor of biology and genetics at Montana State University with degrees from Princeton and Stanford Universities. I hold a lifelong interest in wildlife genetics and the hereditary consequences of adaptation and speciation. I am also a third generation Montana livestockman having managed for twenty years a large family cattle and sheep operation. These two hats, that of the theoretical/idealistic biologist and the market-driven rancher have made me slightly suspect wherever I go.

As a professional biologist, I, along with my students and colleagues, have published studies on populations of diverse taxa in natural habitats in the West--usually at the request of Federal or State agencies. Often their concern has been what their obligations were under the mandates of the Endangered Species Act. We tried to provide a scientific basis for their decision making.

My main purpose in coming here is not to dwell on the scientific problems of the ESA, but to relate my own frustrating experience with the Act as a rancher attempting to perform what would normally be considered a good deed. The tradition in my family has been to give wildlife a break wherever possible. My father reintroduced pronghorn antelope to our region four decades ago, and our region is renown for its herds of elk and deer, its mountain lions, coyotes, bears and soon, God help us, wolves. Few complain.

#### HOW THE WEAKENING OF PROPERTY RIGHTS UNDER THE CURRENT ESA INTERFERES WITH GOOD DEEDS:

Hoping to continue in the family tradition of ecological reconstructive activity, I implored upon my colleague, Dr. Calvin Kaya, a fish biologist with special interest in the Montana grayling, to examine the tributaries of our trout stream for sites suitable for the reintroduction of grayling--a native species which for some reason has disappeared from much of its former habitat, including our ranch. A suitable site was found, and plans were made to do what was deemed necessary. Volunteer help was available, and we were about to proceed when word arrived that the Federal Wildlife Service was seriously considering listing the Montana grayling as an endangered species. At this point people knowledgeable about the heavy-handed approach of the Feds counseled me to forget the experiment. We might lose the right to graze our pastures. My recollections of the horror stories abundant in stockmen's

journals about the hazards of hosting an endangered species didn't help, and I sadly bowed out. It seemed a good deed would probably be punished, and life had sufficient complications without Federal Agents giving orders.

How many times has my story been repeated? How often has the ESA impeded biological restoration? I think more often than we want to believe. Reasonable property owners are frightened and angry at you, the government, for managing with brick bats. Why does the hosting of a rare and troubled creature have to be a threat to their livelihood rather than a source of pride and pleasure? IT DOESN'T. It is clearly unfair to make a few individuals both the scapegoats and the bearers of stress because of forces beyond their control and perpetrated by society at large. We must form partnerships between groups who now fight for CONTROL rather than results.

Habitats vary continuously through space and time. Their management is a constant challenge to those, the local private and public managers, who know them best.

#### WHAT CAN WE DO?

1. We must strengthen, not weaken, private property rights. Wildlife resources on our ranch are safe only when we can protect our property from external abuses whether from private or governmental origin. Nowhere do we look to socialistic countries for clean air, water or concern for endangered species. When governments make mistakes they make big mistakes--usually much larger than private ones. Recognizing this, the state of Montana long ago put its public school trust lands almost entirely under the control of their lessees, the private grazers. Since these public lands are not fenced separately from surrounding private holdings, they receive the same care and attention as the private land at almost no management cost to the public--one visit per decade.

2. You must convincingly remove from the new Act the perception that there is an agenda beyond maintaining a healthful environment. The apparent joy with which Federal Agents have intruded into private lives of ranchers suggests to many a political not a biological agenda. Reaffirming private property rights will convert resisters into cooperators.

3. PRACTICE WHAT YOU PREACH: One thing you can do is to start managing your own showplaces in an appropriate way. Yellowstone Park is a grazing disaster zone recognized as such by professional range managers and ranchers. Biological diversity seems to have a very low priority in the Department of Interior as historical photos reveal the loss of willows, aspen, cottonwoods, beaver, and associated biota due to elk and bison having been allowed to ravage the park while cultivating Brucellosis. A good example of ecosystem management is demonstrated in South Africa's Kruger Park, and if applied in

Yellowstone, would go a long way in selling a conservation program to the West. No large privately held land in Montana is as ecologically abused as Yellowstone National Park.

4. We must seek ways to enlist local knowledge and form the management groups necessary to find common ground and innovative solutions. The next ESA must be an ENABLING act opening doors of opportunity and marshaling latent goodwill that was stifled by the preceding act. The more local the solution, the more likely it will work--you must believe that!

5. We must put money into carrots not sticks. People respond to incentives. For instance, ill-conceived tax structures drive rational people to do socially undesirable acts.

6. We cannot save every variety of every living thing. You must allow the exercise of triage and spend money effectively. Lavish expenditures on dubious acts turns off otherwise sympathetic citizens. Successful private managers invest in the most useful actions.

As a professional biologist, I am alarmed that political correctness has superseded science in advice and council going to the Hill. When the governing board of the Society of Conservation Biology recommended to Interior that Conservation Reserve Lands (CRP) should never be grazed, I realized the depths of biowhoring taking place. A recommendation of a single management plan for over 10 million acres of land is flawed--whatever it may be. Beware of politically correct answers from scientific societies.

I wish the Committee success in its deliberations and offer you any help I can give. Thank you for your attention.

Dr. David G. Cameron  
2004 Centennial Drive  
Great Falls, MT 59404

(406) 453-5378

#### SUMMARY

Fear of losing private property rights has inhibited this rancher from re-introducing the threatened Montana grayling into his streams. Suggestions are given for ways that the new Endangered Species Act might be changed to enlist greater cooperation from private landholders and with these changes to achieve greater success in reaching its goals.

**NANCY H. WHITE**

**Box 186  
Ranchester, Wyoming 82839**

**REPRESENTING**

**Wyoming Farm Bureau**

July 10, 1995

TO: Committee on Resources  
Washington, D.C. 20515

FROM: Nancy H. White  
Wyoming Farm Bureau

I would like to tell you our experiences involving trying to rid our pastures of prairie dogs. We join Fort McKenzie, Sheridan, Wyoming (this area has about 600 or more acres infested with prairie dogs). The land is under the jurisdiction of the Department of Engineers. It is today leased for grazing by Mr. Don Roberts and part of it the Wyoming National Guard uses. I started my communications to get rid of the prairie dogs with Senator Cliff Hansen in the early 1970's. He told me to contact the Department of Engineers, Omaha, who in turn directed me to U.S. Fish and Wildlife and Wyoming Game & Fish. Larry Bourett, who was the Wyoming Agriculture Secretary from 1975 through 1978 offered to help. None of us got anywhere except to receive wordy letters from the powers in these organizations that quoted rules and regulations and that ended it each time. A lot of words and no action is the easiest way to describe it all.

The big and driving force was and is environmental assessment because of the fear that there was one or more Black Footed Ferrets (endangered species) in the area. I know for sure that there were at least three assessments (I'm sure there were more, but I am vague about it); no Black Footed Ferret was ever found, and I'm sure to the disappointment of those people being pressured to do something to clean up the mess at Fort McKenzie and help the adjoining landowners.

All during this period of twenty-five years or more, the landowners adjoining the Fort were doing their best to control the prairie dogs with the various permissible poisons. I would like to very briefly describe to you how this is done. It is laborious and time-consuming, and hardly cheap work. A pill has to be dropped in the prairie dog hole, at which time moisture activates it and a poisonous gas is released. There are thousands of holes. A gentleman who contracts to eradicate prairie dogs tells me he's received \$10,000 in the last two years from three private ranches adjoining the Fort, to poison prairie dogs. We paid him \$3123.75 in November of 1993, and \$409.27 December 21, 1993 for the poison. The cost is prohibitive year after year, and it is year after year. As my husband often says, "One dies and 10,000 come to his funeral and don't leave." As long as the Fort has them, they will be on the neighbors private land. No one has ever been able to teach them about fence lines!

More importantly, all the environmental laws and rules that have caused a lot of this completely ignores the fact that prairie dogs make holes that are dangerous to horses and cows. They cause erosion and wreck the grass; i.e., our livelihood--*a real environmental disaster*.

To effectively eradicate the prairie dog, poisoning should take place at least three years in a row with follow-ups yearly. Mr. Roberts and I prevailed upon Governor Sullivan four years ago to help us. He did. Somehow the National Guard did get some money and they worked on the prairie dog towns one year and for a while the next year, until the money ran out.

Mr. Shadegg's letter suggested I tell you how federal laws and regulations affect the value of privately owned property. I can't do that except to say it devalues it and costs an extraordinary amount of money. We are ranchers and we are good at what we do or we wouldn't be in business. What has been going on at Fort McKenzie is the worst possible example of rules and regulations and devalues its land and all the neighboring lands.

What to do? I would suggest poisoning year after year. If the government waits long enough, someone is going to release a Black-footed ferret, and the Endangered Species Act would end any efforts to stop the prairie dogs from devastating the land. I might add, the Endangered Species Act should be rewritten to protect people from this sort of thing. The prairie dog is not endangered. They are prolific and even with many coyotes, eagles, and people who like to shoot them, they continue to multiply in all areas they inhabit.

In closing, it shouldn't take decades to control this problem. It is nothing but an example of government rules gone awry and the people who administer these lands can do everything wrong because there are too many rules and regulations.

**FOLLOW-UP ADDRESS**

Nancy H. White  
Box 186  
Ranchester, Wyoming 82839

(307) 655-2375

**REPRESENTING**

Wyoming Farm Bureau and Myth Busters  
(Wyoming Cattlewomen and American National Cattlewomen,  
and  
Wyoming and National Stockgrowers)

**SUBJECT**

Attempts to eradicate Prairie Dogs from public lands, which in turn affects all the surrounding privately owned lands.

**RECOMMENDATION**

Intense and continuing program to poison the Prairie Dogs, and a re-writing of the Endangered Species Act to protect the private land owners from the rules and regulations that hamper their efforts to protect their property.



# WYOMING FARM BUREAU FEDERATION

P.O. Box 1348

Laramie, Wyoming 82070 • (307) 745-4835

July 3, 1995

Senator Craig Thomas  
United States Senate  
Washington, D.C. 20510

Dear Craig:

This letter is in response to your request that I review S. 768 (To amend the Endangered Species Act of 1973 to re-authorize the Act, and for other purposes). As I waded my way through the 118 pages I felt there might be some real relief for people in this bill, but the last few pages burst that bubble. The Department of Interior would see a 9 percent increase in funding for 1997, with ten million dollar increases through the year 2001. The Department of Commerce would enjoy a 33.3 percent increase in 1997, with \$5 million dollar increases through the year 2001. The Department of Agriculture would receive \$4 million per year but would be frozen at that level. Convention implementation would be at \$1 million per year. Non-federal conservation planning gets \$20 million a year (but I had trouble tracking section 10(a)(2)(F) -- maybe someone should make sure there is such a section). On the non-federal conservation planning I find some wording on page 47, lines 22-25 but they refer to 10(a)(2)(A) and (B). When we get to "Habitat Reserve Grants" there is only \$20 million appropriated per year -- which indicates to me the government is not very interested in providing compensation to private property owners for providing habitat. Wildlife biologists chant "habitat is the key" every day, yet when it comes to society paying for the use of that habitat they feel maintaining the bureaucracy is six times more important? Six times can be obtained by adding USDI, Commerce and USDA's price tag and comparing it to the \$20 million for habitat.

Page 105 contains some interesting gibberish on lines 17-23. Lines 17-21 seem to give something which is rapidly taken away on lines 21-23. Babbitt has been saying those who own 5 acres or less should be exempt -- but this is not an exemption and could lead to violation of the law by persons who felt they were exempt. This wording is a cruel hoax!

The wording on page 105, lines 9-16 seem to indicate the government's actions up until passage of the legislation is okay. If a buyer should purchase property for which a listing is in effect and the government has not yet decided they want to claim the person's actions are detrimental to the habitat the buyer would be out of luck with this wording. A claim against the government for a taking shouldn't contain the exclusion I find in this sentence.

On page 7, lines 13-17 there may be improper placement of the words "if any" on line 16. Should it be "...obtainable scientific information, if any,"?

Page 11, lines 1-9 refer to hearings. Is the affected area likely to be in an urban area?

Page two

I would recommend the following wording:

"(E) promptly hold at least two hearings in each State in which the species proposed for determination as an endangered or threatened species is located with the hearings being held within the area which would be affected by the determination, except that the Secretary may not be required to hold more than 10 hearings under this subparagraph, unless more than 5 States are affected."

If they propose a listing for 45 States why should only 5 States have the benefit of hearings? It would be very easy for those ten locations to be selectively chosen to exclude the areas which will suffer the impacts. As examples: Bald eagles, gray wolves, whooping cranes, Grizzly bears. Also see Page 25, lines 1-8.

On page 12, lines 6-12 we find the word "equal", but only "negative" findings are subject to judicial review. It might be that positive findings should also be subject to such review. That would pertain to petitions for listing or delisting, and it could certainly cut both ways as far as being detrimental rather than beneficial, but I don't recall our side ever being successful in a delisting petition. We aren't accused of submitting listing petitions so providing for judicial review of "negative" findings only benefits some people.

I don't like what I read on page 20, lines 13-22. That provides the vehicle for all sorts of mischief. I'll relate it to the wolf introduction issue, because the wording on lines 17 and 18 about a "distinct population segment" is exactly what the Yellowstone National Zoo and Central Idaho wolf introduction was all about. If all they have to do is determine that it "is in the national interest based on biological, social, and economic considerations" we'll have a lot more "wolf" introductions. They can job information on the wolf being endangered (when in fact it isn't), show what a great boon it will be socially (everyone loves a wolf) and they can hire some university economist to pull figures from the air to show that it is a bonanza to the economy (Yellowstone National Zoo -- \$23 million per year increased activity because of the wolf, with the livestock losses only being a few thousand dollars). This gives them more latitude -- when they should have less.

There are several references, including one on page 32, line 25 and page 33 lines 1-2 about giving the government a four year grace period. If they don't pay their bills they should be kicked out immediately. Would you rent me a room in Torrington and let me keep it for four years after I quit paying the room rent? Why should Congress be dictating business terms to business? Why not add wording that requires the government to sign a contract providing for late penalties and interest -- based on the rates charged by the IRS? (Also see page 80, lines 4-6).

I was particularly struck by the wording on page 66, lines 1-8. That wording would

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lead me to believe the government, and private persons or enterprises, have equal amounts of time, lawyers, money and access to deficit spending. The individual property owner cannot expect to outlast or outspend the government. The government knows that and acts accordingly. If endangered species are so important why can't the government acting for society (which government always claims wants something) do more than provide muscle to shove people around? To assume the government and individuals are on equal footing disregards the size of the federal budget and the deficit.

On page 84, line 9, 13 and 18 the words "minerals" should be added to those federal resources which could be exchanged. On page 85, line 2 and 3 I find the words "shall be processed as expeditiously as practicable" which could be interpreted to mean the lifetime of a federal bureaucrat, or perhaps longer. I would suggest the wording be changed to say "shall be processed within two years."

Page 86, lines 1-22 exemplify government's impression that only government can do anything. Perhaps the wording about government having "authority, control, or ownership over the area affected" is a sign that old Russia is alive and well here in this nation. Most of the ownership of areas in this nation is by private parties. Why then is the federal government willing to sign agreements with other government entities, but not with private land owners? This section should be amended so that private owners are the primary signatories -- if they choose such. Going around those private owners to the States, political subdivisions of the States or local government is a huge part of the problem. That is exactly what the feds did in the case of wolf introduction. The Game and Fish Department got dollar signs mixed up with common sense and we now have the "natural wolves" in Yellowstone National Zoo being immunized, weighed, measured, and soon-to-be wandering all over the place. If the federal government can't strike a deal with the person(s) who actually own the land there must be something wrong with the government's proposal. Some rewording of that subsection to leave out government and include private landowners would do wonders for the Secretary of Interior's attitude about private property -- and the funding going to more government could be placed in the hands of the persons who actually own the area (habitat). I realize that is a very radical approach but government isn't the answer as is evidenced by the debt, deficit and listing of more and more species.

On page 88 we find more government thinking, in lines 1-3. I don't know of a single member of ours who subscribes to the Federal Register. If the government is going to affect landowners why can't they send them notice, by certified mail?

Society, in the form of the government, wants to only pay half of the cost according to page 93, lines 11-14. Isn't this an unfunded mandate to other levels of government? How about the landowner, who doesn't even get any of the 50 percent from the federal government? Government agrees to each pay half of the direct costs (which will only include

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their costs and the landowners are left with all the problems and associated costs. Government holds meetings, presents other government agencies and employees with certificates praising them for their cooperation, etc. and private property is merely their playground and reason for existing. This is bad! Now we get to page 96, lines 4-22 which some will say takes care of the private landowner. It might and it might not. While this section indicates grants may be made if the property contains habitat that significantly contributes to the protection of the species, another subsection should say the opposite -- that if no grant is provided it is assumed that the property does not significantly contribute or detract from the protection of the population of the species. That clears up the gray areas. The portion found on lines 12-18 appear to be designed to funnel money to the Nature Conservancy and others who don't have to make a living doing real work.

The portion on experimental populations really caught my eye. Page 97, lines 11-13 relative to "the precise boundaries of the geographic area for the release" doesn't do a thing. The precise boundaries of the geographic area for the release for the wolves in Yellowstone National Zoo was three pens. There is a lot of difference between the "release site", the "experimental area" and the area where these individuals of the experimental population will actually eventually be. In the case of the Yellowstone Zoo release we found the feds using terminology such as "primary analysis area", "experimental area", "release site", "release area", etc., etc.. As you know the wolves moved out of the Zoo within two weeks, and two females had pups outside the Zoo. One set of pups was born outside the "primary analysis area", although they have been moved back in for their inoculations, weighing and other "natural" occurrences. The wording on page 97, lines 11-13 should be "and the precise boundaries of the geographic area for the release which shall be the same as the National Park or federal Wildlife Refuge, and the government shall provide assurances that the individuals being released and their subsequent offspring, or offspring resulting from such release, whether they are the progeny of the individuals being released or as a result of mating with individuals with the area, shall not be allowed to leave that area." Why am I so wordy? You might be aware that another wolf lawsuit has been consolidated with our wolf lawsuit. The other lawsuit was filed by the National Audubon Society and the Sierra Club, and it contends that full protection must be provided to the wolves which are already in the Central Idaho area, for those which migrate in and for the offspring of either of those two categories as well as the offspring which might result by either of those two categories mating with experimental wolves. As you can see this is a very complex situation which S. 768 does not adequately address.

The wording on page 98, lines 1-5 would mean, with the above proposed wording, that any individual outside a Park or Refuge would be treated just like any other individual not listed under the Act. A number of years ago we discovered the Fish and Wildlife Service had promulgated regulations relative to experimental populations. That regulation (50 CFR 17.81(d) says, "[a]ny regulation promulgated pursuant to this section shall, to the maximum

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extent practicable, represent an agreement between the [FWS] ... and persons holding an interest in land which may be affected by the establishment of an experimental population." In order to, by regulation, establish an experimental population the FWS is supposed to proceed within the confines of that regulation -- but they didn't do it in the case of the wolf introduction. That is one of the points of contention in our lawsuit. Given their failure to follow their own regulation I suggest the following new subsection (G) to be inserted after line 11 on page 99, "the Fish and Wildlife Service shall obtain a written agreement with any person holding an interest in land which may be affected by the establishment of an experimental population in addition to the written consent in subsection (E). Such agreement shall contain details of the management required of the person holding the interest in land, the method which the government will utilize to reimburse the person holding the land for loss of property and loss of property value as well as the methods used to establish those losses. This requirement is in addition to the written consent in subsection (E)." Subsection (E), page 99, lines 4-6 needs some more wording and should read, "a release on non-Federal land, or a release which has any possibility of resulting in migration to non-Federal land, occurs only with the written consent of the owner of the land and the agreement referred to in subsection (E); and"

If those additions could be amended in I don't think we need a definition of "release area". However should those amendments not be acceptable, this would be a possible definition of "release area":

"Release area" means a National Park or federal Wildlife Refuge, or an area where the federal government has obtained the written consent from those persons holding an interest in land which might be adversely impacted by the introduction of an experimental population individuals being released, and their offspring, whether the offspring are the progeny of the released individuals or are offspring resulting from those released individuals, or their progeny, mating with other individuals of the same species in the release area."

Page 102, lines 17-24 need clarification. Persons holding an interest in land which might be adversely affected by the introduction of an experimental population should be notified by certified or registered mail. Some additional wording would also help clear the air such as "The Secretary shall not consider public hearings to take the place of individual contacts with persons holding an interest in land which might be adversely affected by the introduction of an experimental population. The Secretary is directed to ensure that each person holding an interest in land which might be adversely affected by the introduction of an experimental population is contacted and made aware of the sections of this Act which protect that persons private property rights."

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Page 105, lines 9-16 seem to be recognition of property rights, but the private party should have the same Equal Access to Justice rights as does an environmental group suing the government. Why not provide a subsection saying the government pays all his court and legal costs should the government lose?

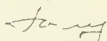
I don't like the wording on water rights on page 108, lines 14-21. Wyoming law provides preferred use for water for man or beast -- which would mean that we would given water to that use, under this Act, over other uses. Place a period after "used" on line 19.

Craig, page 114 contains some wording which irritates me. Why should we be exhibiting these animals if they are so all-fired endangered or threatened. That can hardly be called "education". We need to ensure that they are protected from human interference at all costs. Showing a captive wolf, with a heavy log chain around its neck, is hardly educational. We need to keep those captives in secluded areas where human involvement is kept to the absolute minimum.

This bill fails to deal with the problems involved with 32 cent listing petitions and the definitions of "endangered" and "threatened" which cause problems. It does not resolve the problem with listing subspecies instead of species. The problems associated with easy listing and difficult, if not impossible, delisting is not addressed. The government knows it has a hybrid problem and this bill does nothing to force them to resolve that issue. I'm not very high on this bill! It nibbles instead of taking some real big bites out of the problems.

I'm sure this is not as in-depth as you would have wished, however I have other bills. EISs, EAs, forest plans, wilderness area proposals, wolf lawsuits, etc. to work on too. If you have questions I'd be happy to provide more information and detail. Thanks for the opportunity to comment.

Sincerely,



Larry J. Bourret  
Executive Vice President

cc: Rick Krause  
NER Committee

Testimony of  
 Harold E. Schultz, Board Member  
 Wyoming Wildlife Federation  
 Before the  
 Task Force on Private Property Rights  
 U.S. House of Representatives Resource Committee  
 July 17, 1995  
 in  
 Sheridan, Wyoming

My name is Harold E. Schultz. I am a resident of Riverton, Wyoming, a property owner, a small businessman, a taxpayer and a board member of the Wyoming Wildlife Federation. I am testifying in all the above capacities but mostly as a member of the Federation. The WWF is the state's oldest conservation organization. While it is allied with the National Wildlife Federation, it is a local, grass-roots organization that speaks to wildlife and related issues as they pertain to Wyoming.

I wish to speak to the concept of public natural resources and private property rights. Specifically, I am referring to grass, minerals, timber and wildlife on public land. Are they public resources or are they private property?

In Wyoming, as elsewhere, these resources have been used since before statehood. Oftentimes this use has equaled abuse. Thus, the need for regulations and regulatory agencies such as the Taylor Grazing Act as well as the creation of the Bureau of Land Management and the Forest Service.

Historically, these agencies improved the conditions of the forests and ranges. It goes without saying that these agencies have also made their fair share of mistakes.

These mistakes usually happened when these agencies made decisions, often under political pressure, that usually favored individual users over the overall public good. Not for nothing was the BLM referred to as the "Bureau of Livestock and Mining." The forest service too preferred to see itself as the manager of federally-owned tree farms to the exclusion of all other interests.

Still, these agencies left the resource in better shape than they found it. Also, they have recently been giving more attention to wholistically managing their public lands for considerations beyond just those of commodity production. These land use agencies are realizing that recreation, wildlife, and even esthetics are important.

This has been threatening to some ranchers and miners. A few have responded with threats of violence. In the last few years at least one Federation employee and one board member have received

death threats and/or been the recipient of various forms of intimidation.

On a more positive note, the various users and interested parties involved with federal lands have been able to, on occasion, craft land use plans where all users felt they were winners. An example of such planning are the Coordinated Management Plans such as the one around Green Mountain in the central part of this state and the Muddy Creek CRM south of Rawlins.

However, in recent years a number of parties have felt that the public resources should be private property. In this state there have been two lawsuits revolving around the concept that game animals, up until now regarded as belonging to the state, should become private property. Similarly, timber interests seem to feel that lumber mills are intitled to (i.e. own) the right to a certain amount of lumber no matter what the condition of the forest or what other interests will be negatively impacted. Certain ranchers feel that when they have a grazing lease they are not only entitled to 100% of all the grass within the lease but that they "own" the right physical access as well.

Most of these people have one thing in common: naked greed! They cover this greed with the fig leaf known as "takings" or "private property rights." We feel that the bottom line in these issues is not a honest debate over constitutional issues or private property rights, but instead is an attempt to promote certain private interests over public good.

Recently there have been numerous stories of federal bureaucrats denying property owners the basic use of their property. Some of these stories might be true, but some are certainly apocryphal and there is certainly evidence that some are fiction. The basic message seems to be not that a bureaucracy needs some reforming or that a law could use some fine tuning, but that all government regulations and laws need to be repealed if they hinder economic opportunity. There also have been proposals to either disband some government agencies or to so weaken their power to regulate that the effect would be to have no regulation at all.

Such actions could easily have the effect of debasing the public land to the point it was at in the early part of this century. Extreme use by one type of activity could easily be detrimental to other users of the land. It seems that many proponents of the property rights movement think only in terms of their own self-interest. If taken to its logical conclusion the agenda of the "takings/property rights" movement could lead to chaos since almost any governmental activity could be construed as a taking. Certainly it would gut most environmental requirements which is probably the intended result.

The Wyoming Wildlife Federation believes that mining, grazing, logging and other economic uses are appropriate activities on public land. However, we also believe that recreation, outfitting, tourism, and wildlife are equally appropriate. We also feel that the promotion of extractive activities to the extent that other uses are overwhelmed and degraded is not appropriate land use. True multiple use exists when one type of activity does not overwhelm the other uses.

The Federation also believes that citizens have a fundamental right to the peaceful enjoyment of their homes, their neighborhoods, clean water, fresh air, and the protection of their wildlife resources. These rights could easily be damaged if certain so-called property rights are promoted beyond reasonable limits.

We believe that adequate protection for property rights has been established in the constitution and the appropriate court cases. The right to use property, especially when it is in the form of using the public resources, is not absolute. Even the right to the unrestricted use of real property has not been found to be absolute.

We believe that the public lands should stay public lands. They should not be privatized nor given to the states to be so privatized.

Certainly we believe that wildlife belongs to the people of this state and should be regulated to the benefit of all the people and not just a privileged few. From the remnants and rump herds of sixty plus years ago, Wyoming now has developed enviable wildlife resources thanks to its wildlife department and federal land agencies as well as public-minded land owners.

All of the above implies a certain amount of necessary government regulation. Certainly the land use agencies now in existence do not have a perfect record of Solomon-like decisions. However, it must be said that the lands under their care have fared better than if these agencies had not existed. It also seems that these agencies are truly trying to bring all the different parties into the decision-making process. There is some hope that all parties concerned will be able to profit even though no party will ever get all it wants.

All of the above also implies a certain amount of conflict. This need not be feared if it is civil and reasoned. Such conflict is usually beneficial and is what makes a democracy work.

Therefore, we feel that the takings/property rights/states rights issue is not about the average citizen and his or her home and property. It is about who controls public resources, greed, and not having to be responsible for your actions. This agenda is to the detriment of the public good. It needs to be rejected.

**WYOMING FARM BUREAU FEDERATION**

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Statement of Ken Hamilton  
Administrative Assistant with the  
Wyoming Farm Bureau Federation  
P.O. Box 1348  
Laramie, WY 82070

Thank you for the opportunity to testify before this Private Property Task Force. We especially appreciate the opportunity to discuss the issue of how federal regulations impact private property rights. In my years at Farm Bureau, no one item has been as important as the issue of protection of private property. While the private property issue has been gaining more attention in recent years, it would have been highly unlikely to have had this type of a hearing four or five years ago.

Our founding fathers recognized that unless government had constraints placed on it, its appetite for control over citizens lives would grow and grow. The system of government they established grew out of a system where the government, represented by the king, could arbitrarily take a person's property from him or her, could demand that a citizen feed and house the king's soldiers or could even take that home from the citizen. These types of abuses lead to the downfall of the king's power in America and eventually to the cessation of the powers of monarchs in all of the western world.

However, over the years we see that our government, in the form of an ever expanding bureaucracy and with the consent of some in Congress, seeking to return us to the feudal system from which we evolved.

Our forefathers rebelled against a power that told citizens they had to feed soldiers or give up their homes to these soldiers. Today we have citizens being told that a federally protected horse must be allowed to eat that citizen's forage. A federally protected bear must be allowed to eat a ranchers livestock. A federally protected goose must be allowed to eat a farmers grain. We are in effect requiring a citizen to allow a soldier to eat that citizen's food.

*In Wyoming call 1-800-442-8325*

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Our forefathers formed a government which would respect a citizens rights to own private property. It is important to note that this protection was for all private property, not just land. It was a common practice for armies to "forage" for food in our forefathers time. Indeed, the Continental Congress sent numerous messages to General Washington, telling him he had their permission to "take" what ever food and provisions he needed from the surrounding citizens to feed his army. A message General Washington wisely ignored. But when the Constitution of the United States was written, the representatives realized that as long as government could take what ever they wanted from citizens, whether it be livestock, food, land or homes, without paying for them -- then government would.

The recent Supreme Court decision on Sweet Home v. Babbitt gives the bureaucracy carte blanche to use federally protected animals to take private property, whether its grass or livestock or homes.

Wyoming is the headwaters of the Missouri, Snake and Colorado Rivers and as such has impacts imposed on its citizens by federal government actions or inactions. Those impacts, whether the government recognizes it or not have social, economic and environmental impacts on Wyoming citizens.

Recently the Bureau of Reclamation, of the Department of Interior, proposed regulations on water conservation which would have required water measuring devices on every farm ditch and lateral on every farm under a Bureau project. Strangely, the Bureau had signed a consent agreement with an environmental group and indicated they would impose these requirements. A reading of the Reclamation Reform Act of 1988 however revealed the Bureau did not have authority to require any more than a plan from each district -- the plan to be determined solely by the district itself. This caused a great deal of concern throughout Wyoming. If the Bureau does not have authority why did it sign a legal agreement saying it would do this?

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Because of the Colorado humpback chub and Colorado cutthroat trout we are witnessing requirements for water releases downstream on the Colorado River. The salmon debate on the Columbia is causing concern about the Snake River in Wyoming. The Whooping Crane, Sandhill Crane and Least Tern are being used to dictate water releases and restrictions on water development, in Wyoming. Surely, only the uninformed would contend that these issues do not impact private property use and value.

The federal government has proposed restrictions on sheep grazing on federal land within two miles of Bighorn sheep habitat in southern Hot Springs County. Because of the intermingled nature of private and federal land in the area, this restriction on federal land will guarantee the same restriction will apply to private land, unless the private land is fenced.

Fencing standards used by the federal government makes it impossible to utilize fencing as a management tool on sheep operations that contain mixtures of federal and private lands.

Wetland delineation is a joke in Wyoming. Until U.S.D.A. decided to discontinue delineating wetlands, we had reports of old equipment on top of hills being listed as wetlands, old house foundations and numerous other non-wetland areas being delineated as a wetland. Infrared film can't distinguish water from equipment, houses, etc., etc.

Controlling an overpopulation of prairie dogs on private lands without doing a black-footed ferret search is impossible. However, it is extremely expensive for a landowner to pay a private biologist to do a ferret search and waiting for the government biologist to "get around" to a search could mean waiting five years until a landowner can proceed with control measures. This situation adversely impacts private property.

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A recent proposal by our neighbor the Forest Service to use "ecosystem management" as their management concept on the forest has many adjacent landowners gravely concerned -- as well they should be. Ecosystem management has been described by many "experts" as needing to "cross" jurisdictional boundaries. Given that the Forest Service's philosophy has many times been "do it my way or get out" it is hardly comforting to these landowners to see an agency of the federal government embrace a management concept that everyone recognizes must cross jurisdictional boundaries in order to be successful. What sort of a neighbor is the Forest Service? The narrative accompanying these proposed rules has a section called Civil Justice Reform Act which says, "This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If this proposed rule were adopted, (1) all state and local laws and regulations that are in conflict with this proposed rule or which would impede its full implementation would be preempted..." (emphasis added).

Farm Bureau was involved in EPA's **Guidance Specifying Management Measures For Sources Of Nonpoint Pollution In Coastal Waters** recently. We were involved, not because we are geographically illiterate, but because of the governments insatiable desire to control, control, control, the impacts of these regulations could well have reached all the way up into Wyoming.

Time spent by members reviewing government documents to ensure that their private property is not encroached upon by the federal government is enormous.

We have heard people say that encroachments on private property by government is "not a problem." I wish I could agree with them, but, our people, who own the grass and livestock keep telling me it is. They have been telling me it is a problem for as long as I have worked for the Wyoming Farm Bureau.

We have also heard people say that we cannot possibly compensate people for government "taking" private property, because of the great expense. The two arguments are mutually exclusive. Non problems cannot be expensive.

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Others have said "we don't need legislation to protect private property because the Constitution already protects it." Our members have said that "yes we do need legislation because we don't have access to the hundreds of thousands of dollars necessary to take the government to court like the environmental community nor do we have many attorneys wanting to do pro-bono work on our behalf."

It should be noted that the Constitution also prohibits discrimination.

Thank you.

point where those steps are in a logical sequence.

Paragraph (i) of the proposed rule would provide for the withdrawal of regional guides within three years of adoption of the final rule. The reasons for eliminating regional guides were explained earlier in the discussion of proposed § 215.5. Paragraph (i) also would require that the Regional Guide for the Pacific Southwest Region (R-5) be maintained in accordance with the requirements of the existing rule until the remaining unfinished plans in that Region are approved. In all other Regions, regional guides would be withdrawn within 3 years from adoption of the final rule. The Pacific Southwest Region would need to maintain its regional guide in order to direct development of unfinished forest plans. The Pacific Southwest Regional Guide would be withdrawn within 3 years from approval of the last forest plan in Region 5. In addition, paragraph (i) would authorize the Chief of the Forest Service to extend any regional guide beyond the 3-year period in extenuating circumstances.

Paragraph (j) assures that forest plans address limitations on the size of openings (§ 219.13(g)) prior to withdrawal of the regional guide. The establishment of size limitations is a requirement of NFMA and is currently addressed in regional guides and the existing rule. This provision will assure that there is no gap in having such direction in place during the transition to the new rule.

The transition procedures of this proposed rule reflect current circumstances regarding the status of forest planning efforts nationwide and the nature of proposed changes to the existing rule. To the extent that these or other circumstances are different at the time the final rule is adopted, the agency may have to adopt different transitional procedures in order to assure the most practical, efficient, and timely transition possible.

#### Conforming Amendments

The administrative appeal process for forest plans is set out in a separate rule at 36 CFR part 217, and the administrative appeal process for project decisions is set out at 36 CFR part 215. Due to the nature of changes being proposed to 36 CFR part 219, amendments would need to be made to these appeal rules in order for them to conform to the changes proposed to part 219. First, the terms "nonsignificant amendment" and "significant amendment" would be replaced by the terms "minor amendment" and "major amendment" wherever they occur in

parts 215 and 217. Second, § 217.3(b) would be removed to exclude regional guides from being subject to administrative appeal since these documents would not be retained under proposed revisions to part 219. Third, the heading of part 217 would be amended to remove reference to regional guides and read: Appeal of National Forest Land and Resource Management Plans. Finally, § 217.3(a)(1) and § 217.4 would be amended to exclude interim amendments from being subject to administrative appeal.

#### Conclusion

The Forest Service invites individuals, organizations, and public agencies and governments to comment on this proposed rule. To aid the analysis of comments, it would be helpful if reviewers would key their comments to specific proposed sections or topics. Respondents also should know that in analyzing and considering comments, the Forest Service will give more weight to substantive comments than to simple "yes," "no," or "I heck off" responses to form letter/questionnaire-type submissions.

#### Regulatory Impact

This proposed rule has been reviewed under Executive Order 12866 on Regulatory Planning and Review. The agency has determined that this proposed rule is a significant regulatory action subject to Office of Management and Budget review. However, this proposed rule does not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 605 et seq.).

#### Controlling Paperwork Burden on the Public

This rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR 1320 and, therefore, imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3507) and implementing regulations at 5 CFR part 1320 do not apply.

#### Environmental Impact

This proposed rule would establish procedures for land and resource management planning for National Forest System lands. Section 31.15 of Forest Service Handbook 1909.15 (57 FR 43180; September 19, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative

procedures, program processes, or instructions." The agency's preliminary assessment is that this rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. A final determination will be made upon adoption of the final rule.

#### Civil Justice Reform Act

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If this proposed rule were adopted, (1) all state and local laws and regulations that are in conflict with this proposed rule or which would impede its full implementation would be preempted, (2) no retroactive effect would be given to this proposed rule; and (3) it would not require administrative proceedings before parties may file suits in court challenging its provisions.

#### List of Subjects

##### 36 CFR Part 215

Administrative practice and procedure, and National forests

##### 36 CFR Part 217

Administrative practice and procedure, and National forests

##### 36 CFR Part 219

Environmental impact statements, Land and resource management planning, and National forests

Therefore, for the reasons set forth in the preamble, it is proposed to amend parts 215, 217, and 219 of Title 36 of the Code of Federal Regulations as follows.

#### PART 215—NOTICE, COMMENT, AND APPEAL PROCEDURES FOR NATIONAL FOREST SYSTEM PROJECTS AND ACTIVITIES

1. The authority citation for part 215 continues to read as follows:

Authority: 16 U.S.C. 472, 551, sec. 322, Pub. L. 102-281, 106 Stat. 1419 (16 U.S.C. 1612 note).

2. Amend §§ 215.1(a) and 215.3(c) by removing the term "nonsignificant amendments" and substituting in lieu thereof the term "minor amendments".

2a. Amend §§ 215.4(e) and 215.7(a) by removing the term "nonsignificant amendment" and adding the term "minor amendment".

3. Amend § 215.8(e)(1) by removing the term "significant amendment" and substituting in lieu thereof the term "major amendment".

**Prepared by:**

**Don Meike**

**Board Member**

**Wyoming Heritage Society**

**July 14, 1995**

**(307) 738-2290**

My name is Don Meike, a Board Member of the Wyoming Heritage Society and Wyoming Heritage Foundation. Our organization was founded in 1979 in order to promote Wyoming's economy. As Wyoming's largest and only broad-based business organization, the Heritage Society focuses on state and regional economic problems, promotes the development of natural resources and the multiple use of federal lands, supports responsible environmental practices, works on economic development opportunities for the state and represents the business point of view on regulatory and tax policy issues. In testifying here today we believe:

Our nation has achieved its world status through production and sound utilization of our wonderful labor and natural resource base. This has been done in a private enterprise atmosphere, dependent on private property rights and the inherent protection of personal property that only private ownership fosters. We are risk takers, knowing that even with failure we learn not to make the same mistake again. Our responsibilities, especially here in the West, are not to kill the goose that lays the golden egg. In our case that certainly means sound resource management as we use our natural resources in a sound and safe manner.

Our government in the past several decades has become more responsive to the possible infractions on good management that private enterprise commits, or even could commit. It is here that the numerous good intentions of the rule makers gets out of hand. Over-regulation, especially by the federal government, is becoming more and more common and definitely more damaging to the private property rights we all hold so dear.

A case in point occurred over two years ago. The Buffalo Resource District of the BLM, in updating their Resource Management Plan, listed essentially every creek in the area that ran through any BLM land as eligible for Wild and Scenic River designations. No one disputed that they were all beautiful and that the portions in private ownership were just as scenic as that in the BLM areas. These streams are the life blood of Wyoming. Private owners are not about to desecrate them on either private or public lands. The need for a Wild and Scenic designation was contrary to the wishes of the citizens of our county, and even an insult to resource management.

Wild and Scenic designations, however, would prohibit the further development of the water resources that are connected with these streams. Dams either for diversion or storage could not be built. Fences and other livestock and wildlife management practices would be restricted. Local management that had made our state so desirable to others would be transferred to those who had already wrecked their own playground. The greatest concern of the many citizens protesting this designation is that this is definitely a "taking" of private property. Essentially no one other than BLM employees made any attempt to support any positive action. Nonetheless, the BLM persisted and carried on site to the final stages of nomination. Only with continued effort on the part of the citizens of Johnson County were we able to put the final decision on hold. Apparently, the plan is hidden in the back rooms prepared to pounce if we ever let our guard down. It has taken two years of protests, meetings, letters and other concerned actions to slow this process down.

People in our area are not about to let our scenic landscape be destroyed. Our concern is that too many people is the greatest threat to our wild and scenic rivers and open spaces. A federal designation of that nature will not protect anything, but would only encourage over-usage and desecration.

Wild and Scenic Rivers sounds good, but in reality it is just another of the many infringements on the property rights of the citizens of the West.

We need to be able to hold the decision makers responsible for their actions. Overly zealous citizens, whether they be legislators, bureaucrats, judges or juries, or anywhere in between, need to be held accountable for their actions if they infringe unduly on the rights of others. Our bill of rights needs to be accompanied by a bill of responsibilities. This is a moral obligation that must be implemented not by more regulations, but by holding accountable those who infringe upon the rights of others. Any effort in this area should be appreciated by the citizens of our state and of this nation.

## Supplemental Follow-up Sheet

## Witness:

Mr. Donald L. Meike  
1916 Sussex Road  
Kaycee, WY 82639  
(307) 738-2290

## Designated Representative:

Mr. Bill Schilling  
Executive Director  
Wyoming Heritage Society  
139 West Second Street, Suite 3E  
Casper, WY 82601  
(307) 577-8000

## Summary:

An example of what seemed to be natural resource protection by a federal agency was deemed to be an invasion of private property rights by local citizens.

**U.S. House of Representatives  
Committee on Resources**

**Bipartisan Tax Force on Private Property Rights Issue  
Hearing  
July 17, 1995  
Sheridan, Wyoming**

**Testimony  
of  
Lole G. Herbst, Partner  
Herbst Lazy TY Cattle Co.  
Shoshoni, Wyoming**

**Private Property Issues  
Affecting the Herbert Lazy TY Cattle Co.  
Shoshoni, Wyoming**

Thank you for the opportunity to discuss private property issues with you. I am not representing an organization today. I am representing four generations of a ranching family that began with a homestead on the Wind River in 1906, when the Wind River Indian Reservation was opened for settlement to non-Indians. Frank Herbat came from Gottschee, Austria, an area that is now part of Slovenia, Yugoslavia. Ethnic Germans had been in Gottschee for 500 years, but their rights eroded under Slavic governments. Ethnic Germans could not purchase land, but if you owned land, you could sell it. Frank Herbat was happy to homestead in America and encouraged relatives to emigrate to the West. Land that he acquired over the years was never sold, but there was land condemned for a Bureau of Reclamation reservoir.

Under the condemnation for Boysen Reservoir, if you owned the land and the minerals, both were condemned. A percentage of the minerals was retained by the Dept. of Interior, and the rest were given to the Wind River Indians. If you owned only the minerals, you were allowed to retain ownership. The state of Wyoming had passed a law in 1950, to the effect that minerals on any land purchased or condemned for Boysen Reservoir were to remain with the landowners. The judge did not exclude the minerals from condemnation. Income from mineral leasing has been important to the stability of this ranch.

Frank Herbat died in 1948, the year the condemnation proceedings started. The heirs were given preferential grazing rights on their condemned lands when they weren't flooded, as well as on some adjoining dual occupancy lands. In order to activate the preferential grazing lease, you had to return the letter of authorization to the Bureau of Reclamation. This was not the age of copy machines. We were given preferential grazing leases, the opportunity to meet the high bid, until the Bureau of Reclamation changed their policy in the mid eighties. This land has been turned over to the Midvale Irrigation District to manage and the lease is still ours, though Bureau personnel have tried to develop access in order to open the land for competitive bidding. In the mean time, they did a range study that indicated the 4000 acres of river bottom land will run only 159 total animal unit months, because they want to use the area for development of wildlife habitat and recreation. We used to put our older cows on the river to calve in the spring, run all summer, wean the biggest calves on the ranch, and sell cull cows. The minimal use has not improved the forage. Weed infestation and heavy brush cover were a fire hazard especially during the drought of 1994.

## RAILS TO TRAILS

I mentioned access. When the Bureau of Reclamation acquired land from the Shoshone and Arapaho tribes for the Boysen Reservoir, they left a strip of land that the tribes now use to ban them and sportsmen from using the south portion of Boysen State Park. The tribes do allow us to access the lease which is actually part of Boysen State Park. Now they consider that they have access because a Rails to Trails project has been approved utilizing the original Chicago Northwestern Railroad right-of-way through private lands, tribal lands, and Bureau of Reclamation "take" land that is now part of Boysen State Park.

The Rails to Trails Conservancy was formed by a leader of an environmental group. Legislation was proposed, and Congress enacted the National Trails System Act Amendments of 1983 (16 USCS sec. 1241-1251), & 8(d) of which (16 USCS Sec. 1247 (d)) provided that a railroad wishing to cease operations along a particular route, rather than to abandon the use of the right of way for railroad purposes, could negotiate with a state, municipality, or private group to have the latter assume financial and managerial responsibility for the right of way during its interim use as a recreational trail. Many rights-of-way are over land that railroads do not own, but use under easements. Usually, when a railroad seeks abandonment status, easements will lapse and the title to the underlying rights-of-way will vest to the reversionary land owners.<sup>1</sup> The Trails Act preserves the corridor by preempting laws that otherwise would cause the right-of-way to vest to reversionary landowners upon abandonment of rail service. The United States Supreme Court has found the act constitutional, because any claim that property has been "taken" for public use may be presented to the Court of Claims under the Tucker Act. The Interstate Commerce Commission does not become involved in determinations of whether a particular line is suitable for conversion to a trail under the act, nor can the Commission require a railroad to permit trail use. The Interstate Commerce Commission's function is "ministerial in nature, namely to assure that the statute's requirements have been satisfied." <sup>2</sup>

Chicago Northwestern had sold the railroad line to Bonneville Transloaders Inc. at Riverton, Wyoming, and it was renamed the Bad Water Lines, Inc. . After the required time of owning the line, the owners of the Bad Water Line, Inc. filed for abandonment and the Fremont County Commissioners agreed to assume full responsibility and liability for the right-of-way, and the owners of the line donated \$20,000.00 for funds to maintain the proposed trail. The Interstate Commerce Commission was not required to notify any of the owners of a fee simple interest in the lands underlying the right-of-way. They did contact the Shoshone and Arapaho Tribes who responded that the abandonment could proceed, but not the recreational trail. The landowners protested to the

County Commissioners who formed a trail committee and appointed one landowner, and finally a total of three at our request. We stacked up as zero in voting power against city of Riverton employees, Bureau of Reclamation, State Park, Back Country Horsemen of America, etc. They have had hearings, and the protesting landowners, approximately forty-two of us were listened to, and then ignored.

The county is not able to properly maintain this trail. There was a huge washout, a vehicle plunged off into the space created by the erosion of the bank from the trestle, and were not found for a couple of days since no one patrols the trail. One had escaped the vehicle and crawled to the river for water. A lawsuit was filed, and the county was cleared of negligence. I attach a copy of the Fremont County Attorney's opinion as to the liability of adjacent landowners, but they do not address the fact that we have a fee simple interest in the underlying railroad right-of-way and could be sued, and have the expense of defending a lawsuit. 3.

Other problems are involved as we had predicted. People party in the area, then disturb landowners at all hours to pull them out of areas where they had no business being in the first place. People have been observed cutting fences, and saying they will repair it. People take ATV's and jump them from the banks of creeks into the sand below. They are not to leave the trail which is fenced (in a fashion, except where the trail has been completely obliterated by the Wind River flooding) but that is the first thing they do - leave the trail and trespass private and tribal lands. This trail could provide access to Boysen State Park, but at any point, they have to trespass tribal lands which they do, but they call tribal lands "public land."

Three percent of all federal highway funds returned to the state of Wyoming are available for trail development, so this is only the beginning.

The Wyoming Farm Bureau and Wyoming Stock Growers Association developed policy requesting the repeal of the "rails - to - trails." This policy was accepted by the National Cattlemen's Association, also.

It is not sufficient that we can be compensated under the Takings Act, I do not think there is a sufficient public interest basis for the development of these trails, and would request that this infringement of property rights be reviewed.

1. Summary of J. Paul Presault, et ux, Petitioners  
v. Interstate Commerce Commission et al
2. Ltr ICC to Richard Welsh, National Assoc. of Reversionary Property Owners
3. Fremont Co. Attorney Opinion dated Sept. 25, 1991

Page 2  
Exhibit 1

## U.S. SUPREME COURT REPORTS

108 L. Ed 2d

§ 8(d) was unconstitutional on its face because it (1) took private property—specifically, the landowner's reversionary interest in the right of way—without just compensation, in violation of the Federal Constitution's Fifth Amendment; and (2) was not a valid exercise of Congress' power under the Constitution's commerce clause (Art. I, § 8, cl. 3). The Court of Appeals, however, affirmed the ICC's decision, as it held (1) that § 8(d) did not effect a "taking" of property for Fifth Amendment purposes, because no reversionary interest in a railroad right of way could vest until the ICC determined that abandonment was appropriate; and (2) that § 8(d) was reasonably adapted to legitimate congressional purposes under the commerce clause (853 F.2d 146).

On certiorari, the United States Supreme Court affirmed. In an opinion by BRENNAN, J., expressing the unanimous view of the court, it was held that (1) the Trails Act Amendments did not withdraw the remedy otherwise afforded in "taking" cases under the Tucker Act (28 USC § 1491(a)(1)) through actions in the United States Claims Court; (2) the landowners' failure to make use of the available Tucker Act remedy rendered their "taking" challenge to the ICC's order premature, so that it was unnecessary for the Supreme Court to determine in this case whether the order did effect a "taking" within the meaning of the Fifth Amendment; and (3) the Amendments were a valid exercise of congressional power under the commerce clause of the Federal Constitution (Art. I, § 8, cl. 3), as they were reasonably adapted to the valid congressional objectives of (a) encouraging the development of additional trails and assisting recreational users by providing opportunities for trail use on an interim basis, and (b) preserving established rights of way for possible future reactivation of rail service.

O'CONNOR, J., joined by SCALIA and KENNEDY, JJ., concurred, expressing the view that (1) state law determines what property interest the petitioner landowners possess in the right of way at issue, as the actions of the ICC may pre-empt, the operation and effect of certain state laws but do not displace state law as the traditional source of real-property interests; and (2) the traditional "taking" doctrine will determine whether the Federal Government must compensate the landowners for the burden imposed on any property interest they may possess.



Interstate Commerce Commission  
Washington, D.C. 20423-0001

*Rails  
to  
Tr*

Office of Congressional  
And Public Affairs

September 16, 1994

Mr. Richard Welsh  
Executive Director  
National Association of Reversionary  
Property Owners  
2311 E. Lake Hammamish Place, SE  
Kissaquah, WA 98027

Dear Mr. Welsh:

On behalf of Chairman McDonald, I am pleased to respond to your recent letter concerning conversions of rail lines into recreational trails.

As you know, Congress enacted the Trails Act to establish a nationwide system of nature trails, which would preserve railroad rights-of-way for future rail service. To carry out this policy, the act provides that rights-of-way, which might otherwise be abandoned, can be preserved and used on an interim basis as recreational trails. When interim trail use occurs, the act provides that a rail banked right-of-way "shall not be treated, for purposes of any law or rule of law, as an abandonment."

Many rights-of-way are over land that railroads do not own, but rather use under easements. Often under State law, upon abandonment of rail operations, easements will lapse and the title to the underlying rights-of-way will vest to the reversionary owners. Unfortunately, this destroys the corridor for future trail use. The Trails Act preserves the corridor by preempting law that otherwise would cause the right-of-way to vest to reversionary landowners upon abandonment of rail service. This is the key provision of the act. The United States Supreme Court has found the act constitutional, because any claim that property has been "taken" for public use may be presented to the Court of Claims under the Tucker Act.

All rail lines that have been approved for abandonment are subject to the Trails Act. Whether a line is rail banked, however, is up to the trail use proponent and the railroad. The Commission does not become involved in determinations of whether a particular line is suitable for conversion to a trail under the act, nor can the Commission require a railroad to permit trail use. Our sole function is ministerial in nature, namely to assure that the statute's requirements have been satisfied,

Mr. Richard Welsh  
Page 2

If, notwithstanding the Commission's limited role, you continue to believe adjacent landowner comments are pertinent to a particular case, then those comments should be submitted to the Commission. The Commission will evaluate those comments as appropriate.

The Commission's Section of Public Assistance (SPA) is available to facilitate the public's understanding of the Trails Act and the abandonment process, and to assist public participation in proceedings before the Commission. SPA can be reached by telephoning (202) 927-7597.

Sincerely,

A handwritten signature in cursive script, reading "Richard S. Fitzsimmons".

Richard S. Fitzsimmons  
Director



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County Attorney

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Edward L. Newell II  
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OFFICES OF THE  
COUNTY AND PROSECUTING ATTORNEY  
FREMONT COUNTY, WYOMING

TO: Mike Morgan - F.C.A.G.  
FROM: Ed Newell *EN*  
Deputy County Attorney  
RE: Rails to Trails Project  
DATE: September 25, 1991

**MEMORANDUM**

Mike - Per your request, I have conducted some legal research and offer the following:

**ISSUE 1**

Must the rail line be used as a trail to avoid abandonment?

**DISCUSSION**

16 USC 1247(d) provides that:

"...in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes..."

The critical effect of that section is to require that the interim use of the right-of-way be "in a manner consistent with this chapter." The chapter of federal law referred to is Chapter 27 - "National Trails System". The purpose of Chapter 27 is to found at 16 USC 1241(b) as follows:

"The purpose of this chapter is to provide the means for attaining these objectives (outdoor recreation needs) by instituting a national system of recreation, scenic and historic trails..."

CONCLUSION - ISSUE 1

PB

16 USC 1247(d) and 16 USC 1241(b) require that the rail line be used on an interim basis as a trail if abandonment is to be avoided.

#### ISSUE 2

Are the owners of land through which the right-of-way passes liable for injuries to trail users?

#### DISCUSSION

As required by 16 USC 1247(d) and 49 CFR 1152.29, the County has executed a statement confirming willingness to assume full responsibility for legal liability arising out of the use of the right-of-way. Pursuant to WS § 1-39-106, the County's liability is as follows:

"A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, recreation area, or public park."

The County does participate in the local government self insurance program which provides insurance coverage for these activities at WS § 1-42-103.

If someone were to stray from the right-of-way on to adjacent lands, liability of the adjacent ranchers is limited by WS § 34-19-101, et seq. which generally provides that an owner of land who does not charge an access or use fee is not responsible for injuries to persons using the land for recreational purposes. An owner of land is responsible for "willful or malicious" acts however. I believe this statute would operate to protect the adjacent ranchers. I encourage them to contact their own attorneys or insurance carriers if they wish to confirm my opinion.

#### CONCLUSION

If proven to be negligent, the County is liable for injuries to users of the right-of-way. The County has insurance coverage for those claims. Adjacent ranch owners are not responsible for injuries caused by the County's operation of the right-of-way. Adjacent ranch owners also have the protection of WS § 34-19-101, et seq.

P.9



# WYOMING MINING ASSOCIATION

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PHONE 635-0331  
AREA CODE 307  
HITCHING POST INN  
P. O. Box 866  
Cheyenne, Wyoming  
82003

STATEMENT OF WYOMING MINING ASSOICATION

TO

PRIVATE PROPERTY TASK FORCE

BY

MARION LOOMIS

EXECUTIVE DIRECTOR -WYOMING MINING ASSOCIATION

SHERIDAN, WYOMING

JULY 17, 1995



# WYOMING MINING ASSOCIATION

TESTIMONY OF WYOMING MINING ASSOCIATION

TO

PRIVATE PROPERTY TASK FORCE

Sheridan, Wyoming

July 17, 1995

PHONE 635-0331  
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P. O. Box 866  
Cheyenne, Wyoming  
82003

Mr. Chairman, Congresswoman Cubin, members of the Private Property Task Force, ladies and gentlemen. My name is Marion Loomis. I am the Executive Director of the Wyoming Mining Association. The Wyoming Mining Association (WMA) is a trade association representing 32 mining companies in Wyoming.

Wyoming leads the nation in the production of bentonite for use in the oil and gas drilling industry, foundry industry, and the taconite industry. Bentonite is also used in cosmetics, crayons, and kitty litter. It is truly the "mud of 1000 uses". Wyoming also leads the nation in the production of coal. In 1994, Wyoming producers mined and shipped 237 million tons of coal. That represents almost 24% of the nation's production. Wyoming coal is shipped to 27 states in addition to Wyoming. There have even been some spot shipments to Spain and Europe. Wyoming also leads the nation in the production of soda ash. Soda ash is used in the manufacture of glass, baking soda, detergents, and a variety of other chemicals. Wyoming produces 90% of all the soda ash used in the United States. Wyoming also leads the nation in production of uranium. While U.S. production accounts for less than 10% of the uranium consumption, Wyoming producers lead in the production we do have.

WMA and I thank you for holding this hearing in Wyoming. It is truly an honor for us to have you in our state. Your concern regarding the right of landowners to use their land as they see fit is to be complemented.

Maintaining the use of our private property is certainly a strong concern of the mining industry. In the interest of time I will discuss only three issues that WMA feels could constitute a limit of the use of private property. Those three issues center around:

- Development of coal in alluvial valleys,
- Development of wetlands at mining sites, and,
- Potential development of mining claims.

### **Development of Coal in Alluvial Valleys.**

The Surface Mining Control and Reclamation Act (SMCRA) was passed in 1977. The act has a provision that limits or precludes development of coal in alluvial valleys west of the 100th meridian. Enforcement of this provision has stopped the development of one operation right here in Sheridan County. The coal is located just north of Sheridan. The land owners were not offered coal that would have replaced the economic benefit of the coal they were denied mining, and therefore brought suit against the Department of Interior (DOI). The case progressed through many appeals. The result has consistently been that the DOI did indeed take the private property. The courts have awarded the landowner \$60 million for the coal left in place. The government just recently paid the landowner. The total bill with interest was \$200 million.

WMA is concerned that the potential for further restrictions could exist in other areas of Wyoming. There are many small perennial streams in Wyoming that the Office of Surface Mining (OSM) now considers to be alluvial valleys.

WMA questions why only those coal lands located west of the 100th meridian are restricted from development. Reclamation practices have clearly shown that companies can reclaim all of the impacted areas. As mines progress in the future, new restrictions and impediments will hinder development of logical mining plans, if alluvial valleys are identified on mine properties.

### **Development of Wetlands at Mining Sites.**

The Corp. of Engineers is requiring that any wetland on a mine permit area be temporally replaced while mining is taking place. Industry is concerned that the operator will be caught in a Catch 22 when mining is complete. The reclamation plan will require the operator to reclaim all of the features found prior to mining, and to remove any features constructed during mining such as sediment control features and wetlands. The Corp. of Engineers may require that any temporary wetland constructed during mining be left even though the approved mine plan calls for its removal. The operator could well find themselves caught between two regulatory agencies, both with authority to mandate action incompatible with the other.

WMA endorses the efforts of Congress to make needed changes in the wetland regulations to make sure common sense is applied in enforcing the wetland protection provisions.

### **Potential Development of Mining Claims**

There are many patented and unpatented mining claims located in Wyoming. WMA is very concerned that these legitimate property rights might be precluded from development. Some of the reasons given to oppose development of mining claims is the historical nature of the area. Many of the claims are located in historic mining areas, so it comes as no surprise that the areas of interest for new development have historic significance. But the reason there is historic significance is the very reason the claim is located there in the first place.

I am not aware of any current claim that has been denied because of its historic significance, but WMA is very concerned that as amendments to the mining law are discussed in Congress, recognition of the right of the claim holders are identified and protected. There have been instances where the State of Wyoming has precluded development of mineral resources because of the unique geology, historic, and scenic values.

WMA is very supportive of making the needed amendments to the mining law this year. But, we do urge Congress to take special care to protect the private property rights of the individuals and companies that have valid mining claims. The 1872 Mining Law, and a very large body of administrative and case law interpreting the statute, are the underpinning of an active, self-sufficient, mineral industry in the western United States. This law basically privatized locatable minerals and has allowed free market mechanisms to allocate exploration rights and mineral production. Individuals and corporations are invited to explore on public lands, and are rewarded with ownership of what they find. This ownership is evidenced by a patent which is issued by the government upon showing that all of the requirements of the law have been met by the claimant.

Recently, some members of Congress have identified locatable minerals as a source of government revenue. They would impose a royalty on minerals extracted under the Mining Law of 1872. They would impose such a royalty retroactively to claims that were validated by discovery, but that are not yet through the patent process. In order to put pressure on miners to accede to a change in the law, such proponents have secured enactments of a statute that places a moratorium on BLM processing of patents.

The mining industry has acquiesced in the demand for a reasonable royalty, but has not agreed to retroactive application of the royalty. It is indisputable that a valid unpatented mining claim is property. While we acknowledge that the federal government can impose regulations, such as recording and mandate environmental burdens, we believe that imposition of a royalty of the type being proposed would be a relatively extreme curtailment of legitimate investment-backed expectations, rising to the level of a compensable taking.

We ask that you pay particular attention to these points:

- the patent moratorium proposed in appropriations legislation is unfair and should be terminated.
- Valid and existing rights should be grandfathered in transition language in any new mining law.

Thank you for the opportunity to address you today, and once again thank you for coming to Wyoming.

**Testimony of**  
**Stephanie Kessler**  
**Legislative & Issues Director**  
**Wyoming Outdoor Council**  
**before the**  
**Task Force on Private Property Rights**  
**U.S. House of Representatives Resource Committee**  
**July 17, 1995**  
**Sheridan, Wyoming**

Mr. Chairman and Members of the Task Force:

My name is Stephanie Kessler, I am a resident of Lander, Wyoming, a property owner, a taxpayer, a mother and a staff person with the Wyoming Outdoor Council. For about five years I was executive director of the Outdoor Council, but recently stepped down to a part-time position to have more time with my family. I am here representing the Wyoming Outdoor Council (WOC), which is Wyoming's oldest home-grown, statewide conservation group. Our organization was founded by Wyoming citizens nearly 30 years ago and we remain independent and unaffiliated with any national environmental groups. WOC's mission is to conserve and enhance the quality of Wyoming's environment by educating and involving citizens and by promoting environmentally sound policies.

I have been dealing with legislative issues regarding takings and property rights for over five years in the state of Wyoming. I believe our state holds the record—over any state, and possibly over Congress as well, for having considered takings legislation more often than any other law-making body. And in each of those five years, our state legislature has rejected the concept of compensatory "takings" and most recently and firmly has rejected any legislative attempt to expand the definition of a Constitutional taking. Legislation passed in our 1995 session clearly states:

It is not the purpose of this act to expand or reduce the scope of private property protections provided in the state and federal constitutions.

Sadly, however, we find that both these features—which Wyoming rejected—are included, and in fact, are at the heart of the legislation that you passed over four months ago in the U.S. House of Representatives in HR 925. The reason I use the word "sadly" is because your vote on this matter is a done deal. You did not come to our state to gather our input on this issue before your vote, when it might have been meaningful, but rather you are here now a good four months after the fact!

The Wyoming public rejected legislation such as your HR 925 because they saw it as a taxpayer's nightmare—a budget buster that generated endless new litigation, uncountable costs to state government, new layers of bureaucracy, and undermined all sorts of protections for the public. In addition, in the 5 years of

debate and testimony given on takings in the Wyoming Legislature, proponents never identified one specific example of a state regulation that constituted a takings. I repeat: we never heard one specific example in five years. Instead, our state legislature reaffirmed that the Constitution is working, and in no way did we try to tamper with that codification of law.

Yet these five years of Wyoming experience and debate appear to have been ignored by Congress.

Wyoming people know that this issue is not about those who support private property rights and those that don't. (Whoever they are—I've never met any of the latter!) And it's not about Republicans or Democrats, either. Nor is it as irresponsibly simplistic as the government is all bad, or all good. This debate must be about balance, because, property rights are not an absolute right, and we have over 100 years of Supreme Court decisions affirming that. Professor Art Gaudio, Dean of the University of Wyoming College of Law, stated in a recent paper:

The sum total of all the rights, privileges, powers and immunities a person has in land does not give the landowner the absolute right to do anything he or she may desire on the land. Property owners are not only private persons, but also members of society. As such they owe duties to, and receive benefits from, that society.

We are in a good place today to talk about the Constitution, and how it is working to ensure this balance and protection of private property. The local Whitney Benefits takings suit is a case in point. It is a unique case, with an appropriate result. After an examination of the specific circumstances of the situation, the courts found that a total, 100% taking of an entire property's economic use had occurred as a result of a federal law—and it awarded compensation and attorney fees.

The takings provisions of HR 925, however, are a radical departure from the law applied to the Whitney case, and from our Constitution and over 100 years of case law. It mandates payments for government actions that are not now constitutional takings. It is based on a flawed caricature of constitutional rules, on a radical premise that has never been part of our law or tradition—that a private property owner has the absolute right to the greatest possible profit from their property, regardless of consequences of the proposed use on other individuals, their property, or the public generally.

Under the Constitution, courts have balanced the rights of property owners with the rights of neighboring homeowners and the public. Whether a regulation results in a taking, the Supreme Court has repeatedly emphasized, depends on the facts of the particular case. In evaluating a taking claim, the courts generally consider the public purpose of the regulation, its economic effect on the property owner, and the owner's particular circumstances and expectations. Even in the Lucas case, the Supreme Court ruled that compensation usually must be paid only if a regulation renders property completely valueless, but not even then if that

regulation is consistent with State property or nuisance law or guards against "grave threat" to life or property.

HR 925 ignores the need to look at the facts of each case and directs that all owners of property that experience the relatively small impact of 20% decrease in valuation, on any portion of the property (no matter how small the portion) receive payment. This is directly contrary to the Concrete Pipe decision and 80 years of other Supreme Court decisions that disallow a percentage test and require the alleged losses to be calculated over the entire property. An owner could demand payment from the taxpayers if one acre out of an 1,000 acre parcel was declared a wetland unsuitable for development, but the other 999 could be developed in a variety of very profitable ways.

HR 925 requires taxpayers to purchase all or part of an affected property, at the option of the owner, if the value is reduced by more than 50%, even if the rest of the property can be used in highly profitable ways, or the purchase doesn't serve any public purpose or creates unnecessary management costs and problems.

This bill not only compensates losses an owner has actually incurred, as when an owner wants to build some structure and is denied a permit, but also requires payments when no actual loss has happened or is going to happen. Under this bill, an owner can make a claim up front, as soon as a regulation kicks in, though it may not presently impact the property at all because the owner has no intention of developing, or has other options they might choose or they have no plans to do anything with the property for years. This also runs directly counter to Supreme Court case law decisions. Again, Professor Gaudio states:

The Court also noted that the expectations must be realistic enough to affect the purchase price and not merely be hopes or pipe dreams. Thus, little weight would be given to loss of future profits, unless they were relatively immediate and certain.

The costs of reimbursing such speculative claims in this budget busting approach are almost unimaginable.

All of these features of HR 925 conflict with the constitutional definition of takings. The Whitney Benefits case I noted earlier was a unique case that did meet the constitutional definition and it also did cost our government, in total, about \$300 million. That's just one case. Now imagine opening up the government's coffers for all kinds of speculative claims — as HR 925 sanctions. It's a lawyer's field day. The fiscal impact is unimaginable. What you've created is a "make a claim and we'll make a deal" bill. It's certainly not a "look before you leap bill" — it's a "pay before you look" piece of legislation!

And what could be the actual fiscal impact? I understand your legislation has no fiscal note. Thankfully, we have some estimates developed by responsible state governments who took a serious look at the consequences of such compensatory takings legislation. The New Mexico Department of Game and Fish estimated a fiscal impact to their agency of up to \$14 million/year. Colorado's Department of

Health—over \$9 million/year, and the Arizona Game and Fish Commission—\$10 million/year. Who pays for all this? The U.S. taxpayer.

Let's return to the issue of need for such extreme federal pay-out legislation as HR 925. As I stated earlier, in Wyoming in 5 years the takings proponents could not cite one case of a state takings. They couldn't show what was "broke" that needed to get "fixed" by a radical "takings" law.

What about federal law in Wyoming? Your bill targets two programs in particular: the 404 (dredge & fill) Wetlands Program under the Clean Water Act, and the Endangered Species Act (ESA). What's the evidence from our state on the need for HR 925? Are these federal programs that have run amok, shutting down economic vitality on private lands in Wyoming? The public record shows us—certainly not.

In Wyoming in the last five years the U.S. Fish & Wildlife Service (USFWS) has not blocked any action on private land due to the Endangered Species Act. They have conducted 1,751 consultations and issued 14 jeopardy decisions—representing only .8% of all cases. All of those 14 cases regarded the depletion of water to the Colorado River system which can jeopardize 4 endangered fish downstream. In every one of those 14 cases, a reasonable and prudent, easy alternative was worked out and each party was able to proceed while also helping to conserve the fishery.

Regarding the high-profile Wyoming Toad situation. Both the USFWS and the Environmental Protection Agency demonstrated broad flexibility by working with the Albany County Wyoming Toad Task Force. A reasonable alternative was developed that allowed the use of pesticides and yet still protected the toad. Surveys of high priority habitat were completed in 1994 & 1995 and all desired spraying for mosquito control was accomplished, and actually released for spraying prior to when it was scheduled. In general, the Wyoming USFWS office estimates that less than 10% of their issues even deal with private land. And nationally, the agency reports that out of tens of thousands of consultations, less than one tenth of one percent of projects have been stopped—that's only 18 projects in the entire country.

Regarding the 404 wetlands permit program in Wyoming, there has never been a case in Wyoming where the courts found a real estate takings. In the last 20 years, 3,322 permits have been issued and only 8 permits denied. That represents two-tenths of 1 percent of all permitting. Of those 8 permits, one was the original \$70 million Sandstone Dam boondoggle—and that was a case where a government was going to condemn—actually take—private land. Of the remaining 7 cases, six of those were circumstances where private landowners first broke the law by illegal filling without a permit. The Corps of Engineers allowed all those folks to file a permit application after the fact. Five of the 7 cases were circumstances where the fill illegally constructed by the landowner was shown to alter river hydraulics or stream quality so as to harm downstream property owners or fisheries. All of the 7 cases were provided alternatives and opportunities to redesign structures so as to be

more stable, less damaging or to redesign plans so as to achieve the same desired result. In all of the 7 cases, the private parties demonstrated an unwillingness to cooperate with the agency.

Nationally in this program, less than one half of one percent of all regulated activities are denied. Despite the fact that the Corps of Engineers processes approximately 10,000 individual 404 permits and 90,000 actions under general permits--per year--there have been only three cases--ever!--in which the courts have found a "constitutional taking" requiring payment.

Given this history both nationally and in Wyoming, exactly what is the problem?

It concerns me that a lot of stories are told--horror stories about these federal agencies--that simply aren't based on the facts. There are about a half dozen of these that keep circulating across the nation, but often times if you look at the facts and hear the entire story, you get an entirely different picture. You have to look at the documented record and get a balanced presentation.

It concerns me greatly, also, that when I contacted both the U.S. Army Corps of Engineers and the U.S. Fish & Wildlife Service state offices in Cheyenne on July 13 (only 2 work days before this hearing), neither had been informed of or invited to the hearing--even simply to just listen to the testimony. And yet the express purpose of the meeting is to discuss these federal programs. Why hasn't the Task Force requested of these agencies, in advance, statistics on their programs in Wyoming so everyone will have these facts before them? Is this meeting simply a set-up to bash the federal agencies, when they are not here to present their side? This scenario can be a formula for very dangerous and irresponsible policy development. Are you looking to legislate on antidote or fact?

Your hearing today is also unbalanced because it lacks a substantive presentation regarding our current Wyoming economy and land values. Across the state and particularly in the western part of our state, but also here in the Sheridan area, private property value is increasing. I am not an economist, and so cannot provide you the important statistics you need. But there is no doubt that a major reason for this increase in value is due to Wyoming's public lands and wildlife and the successful work of our federal land management agencies in conserving those resources.

Real estate near national forests, BLM lands, national parks, pristine fisheries, wildlife preserves and open spaces, etc. are greatly increasing in value. Compared to the rest of the country, the Rocky Mountain states' economy is robust (See *Casper Star Tribune* news report on this 5/2/95) and experiencing strong economic growth. There are several nationally renown Western economists who attribute this mountain states rural growth to the high quality of our natural environment, including our clean air, clean water, abundant wildlife and public land. This is not

just an increase in tourism and low-paying hamburger-flipping jobs, but a steady, growing diversification of our Wyoming economy. We are attracting businesses, who, because of the electronic highway, can locate anywhere and they are choosing Wyoming for its quality of life and environment.

Your panels today are greatly unbalanced because they fail to reflect this diversification and growth in Wyoming's economy. This speaker composition is highly slanted towards agriculture, which represents less than 4% of our state's gross state product, as reported by the Wyoming Division of Economic Analysis. Yet I count 1/2 of the speakers representing agriculture.

I will tell you about a serious and documented problem in Wyoming regarding property and how federal laws affect property value. This problem is due to a lack of enforcement of federal laws and a lack of action by agencies regarding pollution. The groundwater under North Casper—which is predominantly a residential area—is contaminated with perchloroethylene (PCE)—a hazardous waste, with concentrations in some places exceeding 1,300 parts per billion. There are also contamination plumes of trichloroethene (TCE) and 1,1,1 trichloroethane. The groundwater cannot be used for drinking, bathing or cooking and North Casper residents are concerned over health impacts within their homes from the vapor fumes.

This pollution impact to North Casper, affecting about 850 homes, has resulted in an average 43% decrease in area property values. The citizens of North Casper, who have formed a group known as "Pollution Solution" have spent months and months trying to get our federal and state agencies to research the extent of the contamination plume, identify the responsible parties, and address the problem and damage to their property. Agency response has been abysmal. If you want to address a documented case of massive property devaluation and harm in Wyoming—you should investigate this situation. Here's where real, substantial property harm is occurring. This is just one example of many in Wyoming—where industrial pollution or development can significantly harm private property or its value.

The Task Force asked me here today to relate my experience regarding federal programs and private property. I have provided you with the record of agency actions in Wyoming regarding the ESA and wetlands and those figures demonstrate a conservative approach and a great willingness to work with the public and work out alternatives. This is not to say, however, that all federal land management agencies are perfect. Problems arise, conflicts occur with landowners, and sometimes agency staff make life harder than it needs to be. No doubt, also, there are costs due to regulations that landowners and citizens have to bear. Probably some of these are unreasonable and should be addressed. But specific problems and issues must be clearly identified and documented. A variety of remedies should be looked at. If a rule or regulation can be modified to balance both the landowner's concerns and the larger public's needs—then that mechanism should be pursued.

We are not against trying to fix the problem. It's just that many generalities and stories are told without identification of a specific problem.

Your federal pay-out taking bill--HR 925, however, is not the answer and it will create a much, much bigger problem than any that currently exists. Such so-called "takings" bills are fiscally irresponsible and a tax-payer's nightmare. They are not addressing a specific, well-researched set of documented problems, but appear to be based on generalities and agency-bashing. Where is your documentation and evidence of the need for such a sweeping federal entitlement program? How can such a budget buster be justified in today's climate of fiscal restraint? How can such legislation--which will generate a flood of frivolous litigation--be justified in today's political climate of limiting lawsuits?

It is shocking that the only two Task Force hearings to date have been scheduled in states where there is a clear public record of debate and rejection of the sort of takings legislation you support in HR 925. Are you really coming to Arizona and Wyoming to gather public input (when it's no longer timely), or to try to change our minds or put a different "spin" on our states' record?

If this Task Force hearing is any evidence of the amount of balance, level of detailed research and public accountability that the Committee on Resources uses to craft U.S. public policy, then it is no wonder that so many Wyoming and American citizens feel apathy towards Congress. Our Wyoming State Legislature has done a far better job at examining the range of issues, getting out the facts, and soliciting meaningful and timely public input on this topic, than you have. I urge you to listen to what we in Wyoming have already done. Go back and scrap HR 925. Respect the Constitution and the 100 years of case law we have with it. Solicit balanced input from the public in a timely manner and do your homework on the facts of the problem and the fiscal impacts.

You have not shown us credible legislation that protects people, property, our environment or our communities. You have given us a new federal entitlement program for special interests that will be borne on the backs of the rest of us taxpayers.

*Bill History as recorded in Bill Journal on Ferret System*

Pages 2 through 12 Delete entirely and insert:

"AN ACT to create W.S. 9-5-301 through 9-5-305 relating to administration of government; providing for agency evaluation with respect to regulatory takings of property as specified; providing definitions; providing guidelines to establish a taking; requiring certain specified procedures; declaring a purpose; and providing for an effective date.

Be it Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 9-5-301 through 9-5-305 are created to read:

### ARTICLE 3

#### REGULATORY TAKINGS

9-5-301. Short title. This act shall be known and may be cited as the "Wyoming Regulatory Takings Act."

9-5-302. Definitions.

(a) As used in this act:

(i) "Constitutional implications" means the unconstitutional taking of private property as determined by the attorney general in light of current case law;

(ii) "Government agency" means the state of Wyoming and any officer, agency, board, commission, department or similar body of the executive branch of state government;

(iii) "Governmental action" or "action":

(A) Means:

(I) Proposed rules by a state agency that if adopted and enforced may limit the use of private property;

(II) Required dedications or exactions from owners of private property by a state agency.

(B) Does not include:

(I) Activity in which the power of eminent domain is exercised formally;

(II) Repealing rules discontinuing governmental programs or amending rules in a manner that lessens interference with the use of private property;

(III) Law enforcement activity involving seizure or forfeiture of private property for violations of law or as evidence in criminal proceedings;

(IV) Orders that are authorized by statute, that are

*Bill History as recorded in Bill Journal on Ferret System*

issued by a state agency or a court of law and that were the result of a violation of state law;

(V) Actions necessary to maintain or protect public health and safety.

(iv) "Private property" means property protected by amendments V and XIV of the constitution of the United States or article 1, section 33 of the constitution of the state of Wyoming;

(v) "Taking" means an uncompensated taking of private property in violation of the state or federal constitution;

(vi) "This act" means W.S. 9-5-301 through 9-5-305.

9-5-303. Guidelines and checklist for assessment of takings.

(a) The attorney general shall develop guidelines and a checklist by October 1, 1995, to assist government agencies in the identification and evaluation of actions that have constitutional implications that may result in a taking. The attorney general shall review and update the checklist and guidelines to maintain consistency with changes in the law.

(b) In formulating the guidelines and checklist, the attorney general shall consider the following:

(i) A description of how the action or regulation affects private property;

(ii) The likelihood that the action or regulation may constitute a taking;

(iii) The statutory purpose to be served by the action or regulation;

(iv) Whether the action or regulation advances that purpose;

(v) Whether the restriction imposed is proportionate to the overall problem;

(vi) An estimate of the agency's financial liability should the action or regulation be held to constitute a taking of private property;

(vii) Alternatives considered by the agency, or proposed by the public, which would reduce the impact of the regulation upon private property;

(viii) Any other relevant criteria as may be determined by the attorney general.

9-5-304. Agency responsible to evaluate takings.

(a) The agency shall use the guidelines and checklist prepared pursuant to W.S. 9-5-303 to evaluate proposed administrative actions or

regulations that may have constitutional implications.

(b) In addition to the guidelines prepared under W.S. 9-5-303, state agencies shall consider the following criteria in their actions:

(i) If an agency requires a person to obtain a permit for a specific use of private property, conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is issued and shall substantially advance that purpose;

(ii) Any other relevant information as may be determined by the agency.

9-5-305. Declaration of purpose. The purpose of this act is to establish an orderly, consistent process that better enables governmental bodies to evaluate whether proposed regulatory or administrative actions may result in a taking of private property or violation of due process. It is not the purpose of this act to expand or reduce the scope of private property protections provided in the state and federal constitutions.

Section 2. This act is effective July 1, 1995." PARADY, LUTHI, BEBOUT

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Amendment adopted.

#### ROLL CALL

Ayes: Representative(s) Anderson, Badgett, Baker, Baty, Bebout, Burns, Case, Devin, Dewitt, Diercks, Erb, Eyre, Gams, Hageman, Hanes, Hinchey, Hines, Huckfeldt, Johnson, Law, Luthi, MacMillan, McConigley, McMurtrey, Moore, Nagel, Parady, Park, Paseneaux, Perkins, Philp, Reed, Rose, Selby, Sessions, Shippy, Shreve, Simons, Stafford, Stark, Tipton, Wasserburger, Willford and Mr. Speaker.

Noes: Representative(s) Barker, Bensel, Betts, Boswell, Bowron, Harrison, Massie, Mockler, Morrow, Nelson, Ryckman, Taylor-Horton, Tempest, Tomassi, Wooldridge and Zanetti.

Ayes 44 Noes 16 Excused 0 Absent 0

Failed Third Reading.

#### ROLL CALL

Ayes: Representative(s) Anderson, Baker, Baty, Bebout, Dewitt, Diercks, Erb, Eyre, Gams, Hageman, Hines, Huckfeldt, Luthi, McMurtrey, Moore, Nagel, Parady, Park, Paseneaux, Philp, Reed, Shreve, Simons, Stafford, Stark, Willford and Mr. Speaker.

Noes: Representative(s) Badgett, Barker, Bensel, Betts, Boswell, Bowron, Burns, Case, Devin, Hanes, Harrison, Hinchey, Johnson, Law, MacMillan, Massie, McConigley, Mockler, Morrow, Nelson, Perkins, Rose, Ryckman, Selby, Sessions, Shippy, Taylor-Horton, Tempest, Tipton, Tomassi, Wasserburger,

**WYOMING 404 ACTIONS**  
 (As of 3/2/95)

**OVERALL TOTALS (1976-1995)**

Individual Permits	536
General Permits	130
Nationwide Permits	1638
Exemptions/No Permit	345
Miscellaneous (JDs, enforcement, etc.)	681
Total Actions Documented	<u>3,330</u>
Total Actions Denied	8

**Cheyenne Office Actions for Last 3 Fiscal Years\***

<u>FY 1994</u>	Issued	Withdrawn	Denied	Avg. Time of Review (Days)
Individual Permits	25	4	0	157
General Permits	26	N/A	N/A	24
Nationwide Permits	298	N/A	N/A	23
No Permit Required	52	N/A	N/A	N/A
Field Visits	<u>48</u>	<u>N/A</u>	<u>N/A</u>	N/A
Total	449	4	0	

FY 1993

Individual Permits	23	5	1	154
General Permits	11	N/A	N/A	10
Nationwide Permits	202	N/A	N/A	19
No Permit Required	71	N/A	N/A	N/A
Field Visits	<u>81</u>	<u>N/A</u>	<u>N/A</u>	N/A
Total	367	5	1	

FY 1992

Individual Permits	19	10	2	288
General Permits	38	N/A	N/A	16
Nationwide Permits	235	N/A	N/A	26
No Permit Required	60	N/A	N/A	N/A
Field Visits	<u>42</u>	<u>N/A</u>	<u>N/A</u>	N/A
Total	394	10	2	

\* Totals do not include compliance actions, resolved enforcement actions other than permit issuance, and preapplication conferences.

REPRESENTATIVE LIST OF WYOMING WATER  
DEVELOPMENT/USE PROJECTS  
REVIEWED BY THE OMAHA DISTRICT

Current Projects

Greybull Dam	Draft EIS in progress; Individual Permit application anticipated
Sandstone Dam II	Draft EIS in progress; Individual Permit application anticipated
Tie Hack Dam	Draft EIS anticipated in April; Individual Permit application received, on hold until DEIS is released
Twin Lakes Dam	First proposal withdrawn; Individual Permit application received; review on hold until Forest Service draft EA is released

Historic Projects

<u>Project Name</u>	<u>IP</u>	<u>Issued</u>	<u>Denied</u>	<u>NW</u>	<u>EX</u>
Crow Creek Dam		X			
Green River/Rock Springs/Sweetwater County JPB intake		X			
Bridger Valley JPB intake		X			
Highland Irrigation (Fremont Lake) Dam		X			
Sandstone Dam I			X		
Deer Creek Dam		X			
Douglas Intake		X			
Cheyenne Stage II		X			
Bridger Valley intake		X			
Hunt Canal		X			
Rock River intake		X			
Shoshone Mun. Water Supply JPB Project		X			
Jackson Lake Rehab		X			
Sheridan Water Distribution System				X	
Evansville Intakes				X	
Granite Reservoir Dam Rehab				X	
Crystal Reservoir Dam Rehab				X	

(continued on next page)

<u>Project Name</u>	<u>IP Issued Denied</u>	<u>NW</u>	<u>EX</u>
Goshen Irrigation Pump Facility			X
Little Snake Irr. Diversions			X
Lake Hattie Diversion Rehab			X
Etna Irrigation Diversion			X

Background on Denials

Andrewjeski, Edmund  
File No. 198940003

Applicant proposed housing development adjacent to the Wind River in Dubois, Wyoming. Eight of the subdivided tracts would involve filling in 2.3 acres of wetlands contained within the floodplain of the Wind River. Development as proposed would adversely affect Wind River floodplain with potential impacts materializing downstream on other landowners property. Encroachment onto applicant's land by river erosion and expansion of adjacent highway reduced developable lands. During permit review, additional information was requested. Redesigning and replatting of the parcel could have been accomplished potentially allowing for a full build scenario with limited or no impacts to aquatic resources. The applicant refused to provide any additional information after repeated requests by the Corps, thereby prohibiting a review of the proposal. Permit was therefore denied.

Crittendon, Paul  
File No. 170001512

After-the-Fact application. Unauthorized construction of two channel blocks and dike (made of river cobble) in Hoback River to protect structures from potential erosion. Buildings are located in floodplain, however, they are removed some distance from the existing riverbank. Significant impacts to river hydraulics could result if authorized, potentially causing erosion problems for downstream land owners. Adjacent landowners did comment and complain of the project. Additionally, construction materials would not withstand normal flows of river. This was evidenced by the removal of the majority of fills by the river during the first spring runoff after the project was constructed. Applicant was afforded opportunity to propose a design for one of the fills to withstand high flows. Applicant refused to undertake any new designs to halt bank erosion and refused to remove remaining unauthorized fill. Permit was denied although no fills remain today from project work.

Hayes, Marjorie  
File No. 198608370

After-the-Fact application. Unauthorized fill placed in wetland (high water channel of the Green River). Project purpose is to create upland area for trailer park. Fill material consists of unconsolidated earth, asphalt, and rock. After coordination with interested state and Federal agencies, applicant is directed to remove fill on 9/2/82. Applicant ignores restoration order. File

transferred to Omaha District 11/85. Omaha District allows for After-the-Fact application to be submitted. Application, filled out by Corps on behalf of applicant, is signed and submitted 3/31/86. Applicant refuses to submit application for State water quality certification but eventually does. Objections to project and recommended permit conditions were submitted by Wyoming Department of Environmental Quality (401 certification denied but later issued), Wyoming Game and Fish Department, U.S. Fish and Wildlife Service and the U.S. Environmental Protection Agency in response to Corps public notice for the permit. Applicant asked to respond to concerns and objections. No response received for more than 1 year. Permit is denied and restoration order issued. Fill remains to this date.

Bong, Lee  
File No. 198540001

After-the-Fact application. Unauthorized discharge of dirt, asphalt, concrete, and debris (timbers, gypsum, cans and trash) for 375 feet into wetlands and the Laramie River for the purpose of bank protection. Application submitted 8/10/83. Applicant also proposes to construct 1,100-foot dike to protect trailer court from potential flood waters. Agencies raise concerns that fill material contains items which will cause impacts to water quality. Greenbelt organization has concerns over proposed dike due to conflicts with proposed trail through area. All agencies are supportive of bank protection but use of suitable material is needed. Loss of wetlands/floodplain by dike construction is of concern to U.S. Fish and Wildlife Service. EPA suggests that dike width be reduced due to excessive impacts to wetlands. Applicant and attorney work with Conservation District and city to address trail issues. Corps action on permit halts. Applicant unable to resolve issues concerning trail. Corps met with applicant on site 4/85. Applicant agreed to remove asphalt and trash from bank protection work. Follow up visit conducted 6/26/85 with no change. 7/3/85 site visit revealed that no materials had been removed but that additional fill in wetland had occurred. Applicant's associate stated that 1,100-foot dike proposal is abandoned but that complete filling in of the floodplain is proposed. Applicant advised of second violation of Clean Water Act. First After-the-Fact permit application is withdrawn. Second ATF application received 11/20/85. Applicant proposed to construct dike and incorporate road into design and stated that all noxious materials from previous work have been removed. EPA and USFWS both recommend denial due to losses to wetlands and floodplains as well as the lack of need to put road adjacent to river. The city raised concerns over conflicts with the greenbelt. Wyoming DEQ denied 401 certification on 1/14/86. Therefore, the Corps had to deny 404 permit. The applicant restored the site.

Nickel, Ron  
File No. 198812236

After-the-Fact application. Applicant conducted bank stabilization work in excess of the Nationwide permit limits (discharge more than 1 cubic yard per lineal foot and exceeded 500 lineal feet of work). Additionally, the work encroached out into the Wind River. The applicant restored most of the fills and filed an application to place a channel block perpendicular to river flows, cutting off a section of the river. The applicant then proposed to completely fill in the blocked side channel. Local residents, the Wyoming Game and Fish Department, the U.S. Fish and Wildlife Service and the U.S. Environmental Protection Agency all recommended denial of the permit due to hydraulic impacts, potential for increased erosion, adverse effects to habitat enhancement structures previously constructed by Game and Fish, and flooding problems. The Corps' own internal review for hydraulics indicated the proposal would likely result in increased bank erosion, downcutting, scouring and greater channel instability downstream. Standard bank stabilization techniques would meet the applicant's need without adversely impacting the river. The Wyoming Department of Environmental Quality denied 401 certification. Based upon impacts to channel dynamics, water quality and the state's denial of 401 certification, the permit was denied.

Rafter J Partners  
File No. 199240000

After-the-Fact application. Applicant commenced construction of housing development in approximately 4 acres of wetlands without 404 permit. Development manager told by Corps to halt work. Work continued despite recommendation. U.S. EPA took lead on enforcement action. Applicant submitted ATF application 1/17/92. Corps made several requests for additional information. Public hearing held 4/14/92 in Jackson, Wyoming. U.S. EPA and U.S. Fish and Wildlife Service both recommend denial due to less damaging available alternatives within the development itself as well as cumulative habitat losses in Jackson area. Since there were less damaging, practicable alternatives (the applicant had the ability to layout the project within a 455-acre parcel and avoid or minimize wetlands areas), project would result in decreased habitat values, increased non-point source pollution to trout fishery stream, loss of water quality functions, contribute to large cumulative effects due to rapid development in the Jackson area (Teton County, particularly the Jackson area, has more 404 actions than any county in Wyoming), and the project was contrary to the public interest, the permit was denied. Site was restored.

Wyoming Downs  
File No. 198709118

After-the-Fact application. Project commences without 404 permit

and fills 5.8 acres of wetlands adjacent to the Bear River for a horse-racing track. Applicant files ATF application 3/87. Comments received from the public notice for the project recommend denial due to increased flooding potential, impacts to water quality, additional non-point source pollution, decreased habitat values, and impacts to the Bear River as well as the availability of less damaging alternatives. The applicant also made no attempts to minimize impacts by looking at different layouts and designs and failed to provide a compensatory mitigation plan. Therefore, the application was denied. The applicant requested reconsideration of the denial. The Corps met on site and made several recommendations and granted an opportunity to file again for the project. The applicant failed to submit the application and proceeded to sell the track to an unwitting buyer. The Corps worked with the new owner and developed a wetlands mitigation proposal which was constructed in 1993. The fill for the track remains and is still unauthorized.

Wyoming Water Development Commission (Sandstone I)  
File No. 170002659

The applicant initiated the Environmental Impact Statement process with the Omaha District September 23, 1986. Project was to build a 52,000 ac-ft reservoir with a firm yield of 32,000 ac-ft on Savery Creek. The Corps issued a draft EIS in 1/88 and supplemented it in 4/89. The applicant could not identify use of 20,000 ac-ft of storage. Impacts associated with use of this water were unidentifiable. After three years of conducting environmental reviews and allowing the applicant extended opportunity to justify the purpose and need of the project, the permit was denied. The applicant was allowed to file for a scaled-down version, which they have done.

BIGHORN FOREST GRAZING PERMITTEES ASSOCIATION  
 575 SOUTH BROOKS STREET  
 SHERIDAN WY 82801  
 (307) 674-9753

July 10, 1995

Committee on Resources  
 U.S. House of Representatives  
 1324 Longworth House Office Building  
 Washington, D.C. 20515

Subject: Hearing statement presented July 17, 1995,  
 Sheridan, Wyoming

Mr. Chairman, I am David B. Fuller representing the Bighorn Forest Grazing Permittees Association (BFGPA). I am a retired cattle rancher and was a Bighorn Forest Permittee for 35 years. BFGPA is an association of forest grazing permittees consisting of mostly family type operations that graze approximately 200 head of mature animal units of cattle and sheep annually on the Bighorn National Forest. These ranching operations have maintained private lands, for generations, that supply approximately 3/4s of the feed to sustain these animal units off the forest lands year in and year out. Financial statements of these ranches have contained these dependable feed sources for many years. Approximately 1/4 of the total forage resource is obtained from the forest grazing allotment of these ranches.

The National Forest Management Act (NFMA) is the driving authority of the Forest Service today along with National Environmental Policy Act (NEPA) the Endangered Species Act (ESA) the National Historic Preservation Act (NHPA) and the National Archeological Protection Act (NAPA). Regulations having the "full force and effect of law" have been codified in the Federal Register under each of these laws and are constant threats to the Forest Service and grazing permittees of non-compliance to one thing or another. Environmental special interest groups (interested parties) have gained enormous power to obstruct the management and planning of National Forests through the justice systems, using these laws to strangle and harm legitimate and necessary uses of the National Forest System. The courts are becoming the managers and planners of National Forests rather than the professional specialists that are trained and educated to know the natural resources they are responsible for under NFMA as well as the Multiple-Use Sustained Yield Act (MUSY) the Resource Planning Act (RPA) the Federal Lands Management and Planning Act (FLMPA) and finally the organic Taylor Grazing Act.

This recital may seem redundant to this knowledgeable committee but it is crucial to know that all of these laws are acts of Congress and supposedly expressions of, by and for the people. Sheridan County, Johnson County, Big Horn County and Washakie County and the State of Wyoming are contiguous and a very integral part of the Bighorn National Forest and should have considerable authority in the planning and management of the Bighorn National Forest.

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BFGPA/Task Force hearing  
July 17, 1995

Private property rights, which includes accumulated financial reserves of several different sources, such as land, livestock, water rights, physical improvements, equipment and machinery and most importantly a stable-functional family (includes 2-3 living generations). Livestock grazing permits on the forest should not be a threat to these valuable assets due some perception that the ecosystem and biodiversity of which the rancher and his community are very much a part of, may be violating some natural phenomena or natural law that is ecologically and evolutionarily irreplaceable.

My most recent experience with the ESA was the Notice from the Bighorn Forest (BF) that the Peregrine Fund was wanting to introduce the endangered species Peregrine Falcon into the westerly reaches of the Tensleep Canyon which is managed by the Tensleep Ranger District and encompasses several grazing allotments. The hacking site was near the Bighorn Forest boundary and private agricultural lands lying contiguous to the BF. The normal foraging range of the Peregrine Falcon is a ten (10) mile radius of the hack site (nest). The immediate concern of landowners adjacent to the BF/Tensleep Canyon environs was what if, the falcons did not hack in the forest and were found foraging and nesting on private agricultural lands as an endangered or threatened species within a perceived yet undefined ecosystem. How will this introduction effect the planning and management of the grazing allotments? How much investment of time and money will be incurred to mitigate the intrusion of the Peregrine Falcon on private lands and adjoining BF lands? Is this bird a natural species of the biodiversity of this NEPA/ESA perceived ecosystem of federal and private lands?

Or is this yet another indirect means to extract livestock ranching from this geographical area for ideological and political whims of the environmental movement using laws that were not intended by Congress to be used this way???

Wild and Scenic Rivers designations by the BF have implications of wilderness management and recommendations in the Forest Plan (1985) as holdover suitability discovered during RARE I&II. Proposed Rules for Planning and Management of the Forest Service exact ecosystem management, in detail, of enormous commitments by resource users through their permits. Livestock and timber resources may be shut-out due to pure economical costs of rule compliance within ecosystem management and landscape analysis. NEPA will provide the vehicle for obstruction, confiscation and takings of access to public and private lands, utilizing many of the environmental laws mentioned previously, to legitimize the "takings" of public and private properties as perceived in the "public interest" by environmental organizations and the courts. The court ruling (Sweet Home) that said that government regulators can ban destruction of the natural homes of endangered or threatened species on private property is threatening to all those property rights encompassed in a ranching enterprise using public permits and allocations. (See enclosures - copies from Western Livestock Journal)

Page 3  
BFGPA/Task Force hearing  
July 17, 1995

The Sheridan Area Water Supply Joint Powers Board (SAWSJPB) composed of elected officials of Sheridan County and City of Sheridan applied for permits to construct an enlargement of the Twin Lakes Reservoirs (municipal supply under Wyoming water laws of appropriation). Permits were required from the US Forest Service (Bighorn Forest), the Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACoE). The magnitude of the preliminary design indicated that an Environmental Impact Statement (EIS) would need to be developed along with geotechnical and hydrologic investigations. The EIS revealed that a wetland (created by the original storage) was harboring a mountain toad (percieved threatened species). The EPA was in charge of protecting the mountain toad and the ACoE was in charge of protecting wetlands. Permits from both agencies required mitigation for preservation of both the habitat and the species. The ACoE would not accept proposed mitigation of the wetlands that would be inundated by the backwaters of the enlargement and the toad was protected by ESA.

To make a long story short the bottom line has been that to get the federal permits SAWSJPB has redesigned the inlargement as mitigation measure. Storage of water has been sacrificed to a much lesser amount and approximately \$1.5 million has been wasted away in behalf of approximately 20 acres of artificial wetlands and the preservation of a mountain toad that is naturally migratory in seeking sustainable habitat.

This is percieved by taxpayers and citizens of Sheridan and surrounding areas as a "taking" in behalf of a lesser species and their habitat rather than allowing the respectable and legitimate storage of water, an absolute essential to sustain human life as well as the viability of a community of people dedicated to sustain their wellbeing and happiness through taxes and considerable time of public service.

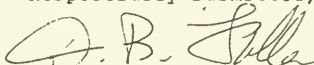
Finally, the BFGPA is heavily involved at this very moment, trying to maintain grazing permits that expire in 1995 and beyond through the mandates of NEPA, a public involvement process administered by the Forest Service. If the public finds that the preferred alternative for renewal of these grazing permits is not acceptable 28 ranches will await permits for the 1996 grazing season and beyond. Most of these rangelands are are healthy and improving ecologically and livestock grazing is essential to maintain this range condition. The Forest Service is expending much time and resources to accomplish this permit renewal under the NEPA process. Ranchers and forest managers are burdened with a process that denies good range management practices in behalf of laws and regulations that don't reflect the needs of on the ground management of the natural resources under their jurisdiction.

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This statement is presented to this committee with the intent that the ESA will be amended to allow these many transgressions to be corrected during the reauthorization process. The Heritage Foundation of Washington, DC has published a book titled "STRANGLED BY RED TAPE" that has a collection of regulatory horror stories that are annotated and authored by Craig E Richardson and Geoff C Ziebart. First printing April 1995. In addition several clippings from livestock newspapers published here in the West reflect many of the current concerns of the Bighorn Forest Grazing Permittees Association.

In behalf of the BFGPA I express our gratitude and appreciation of your coming to Sheridan, Wyoming and for this opportunity to submit testimony for the record of this Task Force on Private Property Rights of the Committee on Resources.

Respectfully submitted,



David B. Fuller  
Executive Secretary  
for BFGPA

Enclosures

SUPPLEMENT TO STATEMENT TO TASK FORCE ON PRIVATE PROPERTY RIGHTS:

David B. Fuller  
575 South Brooks Street  
Sheridan, Wyoming 82801

Telephone: (307) 674-9753  
FAX 307-672-7599

Representing the Bighorn Forest Grazing Permittees Association. Address and phone same as above.

Summary of comments:

- 1) Explanation of BFGPA and the family ranches involved with the Bighorn National Forest.
- 2) Laws affecting management of and access to rangelands of the public domain by livestock grazing and multiple-uses.
- 3) County involvement in planning and management of Bighorn Forest.
- 4) Those components of property rights and their relationship to perceived ecosystem management and the people living in the ecosystem.
- 5) Experience with introduction of the Peregrine Falcon into the environs of the Tensleep Canyon and BNF.
- 6) Wild & Scenic Rivers management and wilderness management and the restricted access thereof.
- 7) Sheridan Area Water Supply Joint Powers Board and their relationship to EPA and ACoE.
- 8) Citizens perception of direct and indirect "takings" of property and property rights without compensation and by direction of court rulings.
- 9) Grazing permit renewals and the NEPA process.
- 10) Referrals to enclosures of clippings and the book "Strangled By Red Tap" published by the Heritage Foundation, Washington D.D.



Gene Surber, kneeling at left in white hat, discusses setting up a rangeland monitoring site and to evaluate changes.

## Monitoring your range pays off in healthier land

Story and Photo  
by Pat Hansen

"Monitoring resource conditions is an important part of managing natural resources, but it is the part that is most often neglected," says Gene Surber, MSU Extension Service Natural Resources Specialist.

During an upland grazing management workshop near Helmville recently, the added, "A photo plot represents a permanent, objective, and transferable record, but the key to success is consistency."

He stressed that it is important for landowners to monitor range and riparian areas to assess whether their

management practices are affecting the condition and health of these areas.

Monitoring conditions on a ranch can be as complete as you want, or as simple as taking a photograph from the same location, with the same view, two or three times a year.

"You need to determine your long-term objectives, whether it be running more livestock and/or providing improved wildlife habitat. Once you have set your goals, you can't get there unless you get started and implement tools which have been proven to work, such as monitoring," Surber emphasized.

(Continued on Page 5)

- 2—12,964 acres bounded on the south by extension to the west of the southern boundary of the N. Cheyenne Reservation and on the north by extension to the west of the northern boundary of the N. Cheyenne Reservation.
  - 3—2,469 acres bounded on the south by extension to the west of the northern boundary of the N. Cheyenne Reservation and on the north by the northern boundary of the Crow Reservation, and
  - 4—9,415 acres bounded on the south by the northern boundary of the Crow Reservation and on the north by the midpoint of the Yellowstone River.
- Sometime after Nov. 2, 1994, when the 103rd Congress passed Public Law 103-444 (the Crow Boundary

(Continued on Page 7)

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## Planners say 'takings' bills based on isolated horror stories

(Fourth of Five Parts)

By Carl Rieckmann

If you're one of America's planners, your education, your experience, your whole professional life centers on helping to design land uses and to decide what restrictions should be placed on other people's property.

If that sounds overly intrusive and busy-bodyish, take solace in the reality that most Americans welcome the concept that communal society needs to have at least some legal and political ability to oversee a property-use agreeableness that engenders good stewardship and neighborliness.

Few people want the porn-flick store in the middle of their residential cul-de-sac or a new feedlot on that downtown urban turf razed of old buildings.

Planning on urban turf seems to get pretty good marks generally. But smiles turn to frowns of concern these days when the reach of planners extends into those

greenbelt areas around cities and towns and into traditional agricultural areas.

They turn to outright scowls as Uncle Sam shows an increasing penchant for getting into land-use planning through federal missions that affect private lands.

Planners are part of today's environmental blend, pushing private landowners on uses and physical appearances that encourage scenic and park-like values perceived as owed to the public in general.

Moreover, even local ones are scouts for Uncle Sam, on the look-out for wetlands, endangered species, archaeological values and other federally mandated interests that can affect private property owners. They work with federal employees carrying out these missions.

The question, of course, is to what degree should government have the police power to dictate private land uses and restrictions without being liable for compensable takings cited in the U.S. Constitution.

One thing is clear: America's planners are concerned (Continued on Page 6)

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Close News  
July 7, 1995

## Planners say 'takings' bills based on isolated horror stories...

AGRI-NEWS, JULY 7, 1995

(Continued from Page 1)  
that pending private property compensation bills in

Congress are going to mask up their professional efforts, and one spokesman

suggests legislators fix perceived wetlands and endangered species problems without creating compensation system they believe will collapse legitimate local planning.

Planners played a significant role in congressional hearings when Executive Director Michael B. Barker of American Planning Association took a combative pose in sharing views of 30,000 APA members before a House Resources Committee private property rights task force.

Barker and his members talk about supporting private property rights and on how still-more careful planning and a extra administrative-review and economic-hardship-variance work should help at local levels to avoid potential takings claims without compensation legislation.

In fact, APA assists in a position paper, the takings' compensation bills are anti-regulation missives aimed at eliminating government regulation of property and that advocates "have simply been searching for a problem that they can use as an excuse for implementing that solution."

"The problem is that the proposed solution to the extraordinary harm to everyone who lives in communities, allegedly in order to remedy the problems of a few hardship cases."

APA virtually ignores problems that they will bankrupt government and leave officials no choice but to back away from using legitimate police powers for fear of inadequate resources to cover takings claims.

Even though pending legislative proposals are aimed at federal establishments, APA stresses they have the potential to bankrupt various levels of government.

Barker insists states may copy-cat such an approach affecting local governments and that otherwise local governments are in the position of carrying out some federal regulations now.

APA recognizes property owner frustration is fueled, in part, by the laboriously long and expensive court procedure of seeking a remedy for a taking.

"Takings" has become a son of shorthand call for help," APA notes.

APA admits today's complex, regulatory environmental and expensive court owners may get caught between more than one set of rules adopted for good but different causes, making for some bizarre hardship cases.

APA places the burden of its cure on more administrative planning and regulatory review.

Even when the group talks about what Congress might do, it suggests creating review authorities or quasi-judicial consolidated appeals—but only for those hardship cases caused by conflicts among multiple federal entities or regulations when considered in combination of state and local regulations.

It says nothing about direct impacts—through no regulatory conflicts—of endangered species habitat or wetlands decisions, for example.

Barker once heatedly suggested during the give-and-take of the hearing that Congress should fix these problems separately if they are the difficulties spurring the compensation bills and leave the rest of America's traditional planning work alone.

APA suggests benignly that government regulation should avoid hardship, permit reasonable flexibility to minimize it (with alternate compliance methods to reduce economic costs), include everyone in reviews and make sure economic analyses include both benefits and hardships.

But it makes no bones about costs to government. "Because of the dampening effect that monetary remedies may have on the legitimate exercise of the police power, the APA supports non-monetary remedies that are consistent with the purpose of the regulations (such as transferring development rights, clustering, alternatives or land trades)," the group observes.

"In the limited number of cases where monetary remedies may be necessary, or appropriate, the APA supports those remedies that are least costly to taxpayers."

Besides being against a regular compensation machinery, which APA insists would require a complex bureaucracy to administer, it also opposes requiring separate economic impact statements identifying and weighing impacts of proposed new regulations on private property.

Good planners understand the general economic consequences of their actions, specific relief for affected landowners should be noted separately and a general separate report only takes time and costs money, APA asserts.

Barker likes to remind that owners pay nothing to government for gains enjoyed when their property values increase from land-use regulation. A theme that plays well with task force minority member Rep. Sam Farr, D-Calif.

Farr is bothered by how very intrusive regulation has greatly enhanced property values in his home community of Carmel, where local zoning even restricts the kind of trees homeowners are permitted to plant.

Barker's planners say they are satisfied with four tests that Supreme Court justices have set to identify or deny takings:

- Where an owner has been denied "all economically viable use" of his land.

- Where regulation forced an owner to allow someone else to enter onto his property.

- Where regulation imposes burdens or costs on owners not bearing a "reasonable relationship" to impacts of a project on the community generally.

- Where government should use the less-intrusive regulation in situations when it can accomplish a valid public purpose through regulation or a requirement of dedicating property.

Even with those generally fair rules, APA notes some local communities can get stuck when a court finds a situation of damages due an owner and gives the entity the choice of buying the land or compensating him for loss of use of a property while an unconstitutional regulation was in effect.

"Although that is a far less burdensome rule than an absolute mandate that a local government buy property, even the mandate that governments pay for a temporary taking is sort of an unfunded mandate," APA figures.

Although a local entity budgets for land in an eminent domain capital project, an agency doesn't when it adopts a new regulation, the group says.

"Thus, a sudden court order requiring that it pay for land that it thought it was simply regulating," (Continued on next page)

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about the possibility of revisiting the Act in Congress.

From 11:10 until noon, the Steering Committee charged with implementing the provisions of the Act will report on "responsibilities and action to date."

State lessees and non-Tribal members of the audience have an hour—1 to 2 p.m.—to air feelings about consequences of the Act, one of the first—if not the first—opportunities they have had to do so in a public forum.

The time slot from 2 to 3 p.m. is slated for public comments from the Crow tribe.

A large and vocal audience is expected.

## Horror stories ...

(Continued from Page 6)

can be an unpleasant fiscal surprise for a government entity and its taxpayers," APA offers.

And, it insists, because owners sometimes seek unfairly to profit from an opportunity, courts have been "quite cautious" in finding takings in cases.

APA also points to the Supreme Court observation that statutes or regulations to prevent nuisances are not considered a taking but notes government policing powers historically have been recognized to go beyond such mere preventions as nuisances, including authority to maintain a "beautiful as well as healthy" standard.

Barker takes a philosophical view that the current push for special takings compensation will have a negative effect for property owners as well as society generally.

He finds it ironic that the same Congress seeking to lower the federal deficit is entertaining compensation legislation that could add billions of dollars in public debt from claims and government handling bureaucracy.

The legislation could discourage or add uncertainty and cost to property development, generating a tremendous amount of land-use litigation, he thinks.

"If a developer wants to build a shopping center, a nearby resident could claim that such development would reduce his or her property value as a result of increased traffic and noise," Barker relates.

"Who knows how or when it will end, but it will wind up in the courts."

He maintains, all planning and zoning ordinances would only be in effect realistically until threatened by a compensation claim.

"As a result, the very tools that add certainty to the value of private property—namely planning and zoning—will be left on shaky grounds, and there would be fewer protections for private property," Barker proclaims.

NEXT: Attorney James S. Burling of Pacific Legal Foundation says it's not a small handful of distorted horror stories out there that says need for private property owner relief.

tat-conservation plans, we can have an ESA that protects property rights and

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## Sweet Home ruling blasted

## Pombo optimistic on passage

U.S. Rep. Richard Pombo, R-Calif., said recently he felt that a special task force report and proposed legislation to reauthorize the Endangered Species Act will find favor in both houses of Congress. He also indicated that a bill for House consideration will be ready when Congress comes back to the Capitol from Independence Day recess.

Pombo heads the special U.S. House of Representatives Task Force on Endangered Species and it is this group which has been charged by House leadership with drafting the House version of the reform proposal.

Currently, both the Senate and House are awaiting the introduction of bills, with House Resources

Chairman Don Young, R-Alaska, as the leading sponsor there.

In the Senate it is thought that a bill proposed by Sen. Slade Gorton, R-Wash., has limited support pending introduction of a bill now being drafted, which would carry Sen. Dirk Kempthorne, R-Idaho, as chief sponsor.

Washington sources said last week there is a question about timing on introduction of the bills. Congress is due to re-convene July 10, but committee staffers said last week the first action on the floor of either house may not come until Wednesday of this week (July 12).

(Continued on page 4)

## Lobby effort on ESA due major drive

## Combined Reports

Property rights advocates, including members of even major agriculture organization in the nation last week moved to build a fire in Congress that will result in a total reform of the Endangered Species Act (ESA).

Advocates called for an all-out grassroots effort to support the ESA reform proposals which should be ready for congressional action some time soon.

On June 29 the U.S. Supreme Court ruled 6-3 that government regulators can ban destruction of the natural homes of endangered or threatened species on private property.

The ruling came on an appeal of a case styled Interior Secretary Bruce Babbitt vs Sweet Home Chapter of Communities for a Greater Oregon over protection of the northern spotted owl. The court said the 1973 ESA provides "comprehensive protection for endangered and threatened species" and the government's interpretation that such protection includes habitat is reasonable.

The court said that even unintentional harm can violate the law.

## An appeal

The high court ruling was on an appeal from a federal appeals court ruling last year that said the ESA bars only direct threats such as hunting, trapping or otherwise directly killing the species—but not indirect threats such as destruction of habitat.

While the ruling drew applause from the Clinton Administration, particularly Babbitt, and environmental groups, outrage was

(Continued on page 4)

## Briefly

## MARKETS

## Fed cattle

As expected, trade was slow last week in wake of the July 4th Independence Day holiday. The limited trade saw most prices firm from \$2 to \$3, the lower part of the range on cattle sold Thursday.

Feeder calves seemed to be current and were

## Feeders &amp; calves

Prices were mostly steady to previous week ranges, as numbers fell off during the holiday week. Many Monday and Tuesday auctions did not sell last week.

## Slaughter cows

The packers remained active on those classes, but offerings were limited and a true test was not available most places. USDA market news reports indicated.

Demand was mostly moderate.

Markets appear on Pages 6 & 7.

✓ **WETLAND SUIT** Green County, Iowa producer Charles Gunn has filed suit in federal court to challenge USDA ruling that he can't farm part of his land the agency lists as a wetlands area. The suit resulted when USDA said he had to leave the land idle after it had been used for years. Page 11.

✓ **SUPPORT A** group of North Dakota producers has gotten an endorsement to its plan to erect a producer-owned pickling facility from the state Beef Commission. A grant from the commission is pending a legal study of the provisions of the Beef Checkoff. Page 3.

✓ **STEWARDS** — The Montana Stockgrowers Association has named Sits Angus Ranch as its 1995 Environmental Stewardship award winner. The program at the Sits Ranch is extensive. Page 10.

✓ **NON-FED REPORT** — The National Cattlemen's Association has

revised availability of an executive

## States back grazing law

## NASDA urges management change

According to Frank A. DuBois, president of the Western Association of State Departments of Agriculture (WASDA), legislation modifying federal land management policies will shape the future of western states depending on federal rangelands for growth and stability of livestock, related industries and maintaining community social structures.

DuBois, also director secretary of the New Mexico Department of Agriculture and board member of the National Association of State Departments of Agriculture (NASDA), expressed his feelings during a hearing before the Senate Energy and Natural Resources Subcommittee on Forests and Public Land Management.

DuBois focused on three parts of the proposed legislation that "would have the greatest impact and relevance on the western states."

✓ **Develop standards and guidelines for the administration and management of federal rangelands in conjunction with state departments of agriculture.**

✓ **Use the process of consultation, cooperation and coordination.**

tion to develop allotment management plans, a process which would mirror that currently in practice under Section 8 of the Public Rangelands Improvement Act (PRIA).

✓ **Assure that the issuance of a term grazing permit or lease that is consistent with a land-use plan not be considered a major federal action which requires a National Environ-**

mental Policy Act (NEPA) response.

According to DuBois, NASDA supports allowing permits or leases title to structural range improvements which are located on federal lands as provided by the bill. He also said NASDA supported the water rights provision in the legislation.

NASDA also supports an ap-

(Continued on page 5)

## Time to write Congress

With the time growing short on getting House and Senate action on the Livestock Grazing Act of 1995, ranching industry leadership last week was working through state organization to get grassroots support for the grazing act.

That support, leaders of the Public Lands Council said, must include an urgent plea for rapid markup and processing of the proposed legislation which will undercut a proposed federal rangeland reform proposal which threatens western states ranching industry people with extinction.

The Public Lands Council, National Cattlemen's Association, American Sheep Industry Association, the American Farm Bureau Federation and National Association of Grasslands were urging members to respond to the plea in an immediate manner.

It was hoped when Congress recessed for the Independence Day holiday the last week of June, that markup of the bill in

(Continued on page 4)

## In the U.S., Japan, Australia

## BEEF: a common international bond

## Knight-Ridder

Beef appears to be the preferred meat in the U.S., Australia and Japan, according to a recent survey, but consumers revealed

Japanese and Americans were inclined to say the government, food processors and marketers are not doing a good job of making sure the food consumers buy is safe to eat. However, quality

usually than overseas in all three countries.

Many consumers expected their consumption of many meats to decline slightly in coming years. American respondents were more likely than Japanese to

## BEEF: favored

Although consumers in all three countries felt producers should fatten cattle on grass rather than in feedlots, more Japanese felt this way than was

(Continued on page 4)

Western Livestock Journal July 10, 1995

war on USA moves  
to Congress now

*(Continued from page 11)*

Little land either before or after a State exercises its right of eminent domain oversight committee that all environmental statutes must be reformed as unnecessary regulations are avoided and property owners are compensated when unavoidable regulations result in the taking or devaluation of private property.

The House Resources Committee is Chairman Tom Young, who has introduced legislation in Alaska, and I expect to introduce similar legislation in Montana. The Senate Finance Reform Task Force proposal to amend the "takings" clause does not include blanket modification, unless it leads to the

Saving the civil action might emphasize the need for new private-property protections, but would the reform bill also require compensation for the "linking" of private property for public use, and provide for

The American Farm Bureau also said that the Supreme Court ruling on Sward House was devastating to them as it devalued what it had for landowners and hurt for landowners and their constitutional property rights. AFBF President L. A. Kirk said that the ruling will "polarize the call for common sense reform of the FSA."

**Days numbered**  
Klecker said AFH's "will work with members of Congress to reform the law explicitly." The ESA's days of inactivity also are proof that with "positive regulation reform," Klecker is pledged in a statement released in the wake of the

He urged that NIA members make comprehensive decisions regarding any of their standard bills referred to ESA reform. Advocates for complete reform are at work in Congress to make sure Congress goes for full reform, not just a nibbling on the current law to bring about

"Cattle producers in this country are increasingly frustrated with federal regulations that rule roughshod over them. By providing incentives for species preservation and emphasizing reclamation and employing a sustainable habitat conservation program, we can have an ESA that protects property rights and the environment."

**Must reform**

"As the law stands today, properly owners don't make a profit," he said.

NCA was one of the many organizations which joined the lawsuit. Home, said, with

friend of the court" level out the Street Home rule.

## New organization searching for CEO

A search team has been appointed to coordinate the activities involved with the selection and appointment of a chief executive officer for the new beef organization.

Serving on the team are Jim Webb, Arizona; Rick Allen, Wyoming; Bob Drake, Oklahoma; Ned Ellis, Alabama; George Spencer, Florida; Tim Timmons, California; Dave Wood, California; Earl Petersen, Colorado; and Darlene Friedman, California.

Information about the search process, application procedures and/or candidate qualifications is available by contacting Hedlin & Enterprises, 1025 Ashworth Road, #318, West Des Moines, Iowa 50265; 515/223-1408.

**Combo optimistic on passage of bill**

He said private lawmakers should not let requirements in the bill to require the financial burden of enforcement of the act, which it demands now, slow the bill's progress, he said. Legislators are not to let the bill stall, he said.

[illegible]

ings that are more heavily based on incentives. "One of the greatest dangers for the USA is that it is not supported by the people who are being recruited," he said.

He said the legislation the House will likely introduce "blind" scientific peer review in the agriculture industry seeking a bill which will create for scientific-based and economic safeguards for the vitamins, and local government operations.

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the Senate could be accomplished no later than July 12.

"But, we need some pressure from the grassroots to push for rapid handling of the legislation," said Bill Myers, 1987 executive Myer's, who is serving as NCA's federal lands director. "Some response has been good but additional support for lobbying efforts is desired, to put emphasis to the need for the urgent handling of the legislation."

As of last week, an industry plan to file a lawsuit which will seek injunction relief from implementation of the ranges and reforestation projects on Aug. 21 were still pending but legal

"We are relying wholly on congressional action, just must take every step possible to keep the administration from killing the industry in the West," a statement said. "We desperately need grassroots help on this one," Myers said.

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who asked not to be named said, "I think there's some teeth behind this and that the commission could take any number of actions" if the improvements are not met.

The CFTC also recommended that the Coffee Sugar and Cocoa Exchange meet new requirements and that the New York Mercantile Exchange comply with a number of mandates.

## rules in favor 1 in Klump case

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mit was held by another person, failure to comply with ear-tagging requirements and grazing cattle without a permit. BLM's decisions were to reduce Klump's grazing privileges by 50 percent, over a three-year period, and to eventually sell Klump's cattle, which had been impounded, on May 20.

In backing his decision to uphold BLM actions, Bilby cited the several opportunities given to Klump to sign his grazing permits, submit proper applications, remove his livestock from the land and redeem his impounded livestock.

"We are pleased with Judge Bilby's decisions and his support of the public land laws and regulations," said Lynn Saline, resource area manager for BLM in the San Simon area.

She also said, "This case is definitely not a reflection of the ranching community as a whole; the vast majority of our grazing permittees are good stewards of public lands."

During the case, the court also decided that the Taylor Grazing Act, authorizing the Secretary of the Interior to issue grazing permits, does not create any right, title, interest or estate to federal lands and that the permits could be canceled without reimbursement by the government.

## Beef Empire champs from Hitch family

A Charolais-cross steer, weighing 1,230 pounds won grand champion honors at the live show of Beef Empire Days held recently at Garden City, Kan.

The champion and reserve steers along with the champion heifer were fed in feedlots owned by the Hitch family of Guymon, Okla. The reserve steer weighed 1,226 pounds with the champion heifer tipping the scale at 1,180 pounds.

The reserve champion heifer, weighing 1,146 pounds, was fed and owned by Sublette Feeders.

The reserve steer and top two heifers were solid black.

A total of 168 steers and 130 heifers competed in the contest, judged by Jarrod Callahan, executive vice president of the Oklahoma Cattlemen's Association.

## SDSU research lab dedicated

Dedication of the recently remodeled and expanded South Dakota State University Animal-Disease Research and Diagnostics Laboratory took place June 23-24. The \$6.2 million project was completed in April and serves the \$8.7 billion livestock production and processing industry in the U.S.

## Washington fighting massive taking move

The Washington Association of Wheat Growers (WAWG), Washington Cattlemen's Association (WCA) and the Washington State Farm Bureau (WSFB) recently called upon Congress to stop a 55-million-acre taking of private property by the federal government in their state.

The three organizations oppose the Interior Columbia Basin Ecosystem Management Project (ICBEMP), a seven-state, 144-million-acre project conducted by the Forest Service and Department of Interior to transform land management activities to reflect so-called "ecosystem management."

The WAWG, WCA and WSFB say the project's huge scope and lack of private landowner consultations will lead to private property rights being unconstitutionally taken.

"Proponents of this project say it will not impact private land, but when the plan designates 144.4 million acres of which only 86.3 million are federal lands, it looks suspiciously like a massive land grab of private property waiting to happen," said Steve Appel, president of WSFB. "We believe it's simply an attempt to further regulate our ability to farm or use private lands in a productive manner."

U.S. Rep. George Nethercutt, R-Wash., recently insti-

gated efforts to reduce ICBEMP funding by as much as \$6.1 million, and has received strong support from all three Washington-state organizations for his efforts.

WCA President Bruce Cameron said, "Congressman Nethercutt's efforts could not have come at a better time because private property rights must be sustained."

## Monfort closing lamb fabrication

Monfort announced recently that its Greeley, Colo., lamb facility will cease fabricating operations and will concentrate on slaughter only.

Monfort spokeswoman K.T. Miller said, "We have no intentions of closing the plant; it will continue to operate as a slaughter facility."

According to Miller, the change is a matter of economics.

"It's tough to compete with some of the lamb operations in bigger cities, such as New York, Chicago and Miami, because we don't have the needed operations and facilities," she said.

Monfort also recently closed its San Angelo, Texas, lamb-processing plant, citing a reduction in sheep and lamb numbers as well as a decreasing demand for lamb in the United States.

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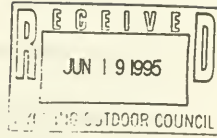
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## THE LAW OF REGULATORY TAKINGS

by Art Gaudio  
Dean, University of Wyoming, College of Law



1. The taking of property is not prohibited by the Constitution, it is merely restricted. The restriction has three aspects: (1) private property, (2) public use, and (3) just compensation. The takings clause of the 5th Amendment to the United States Constitution provides:

"nor shall private property be taken for public use, without just compensation."<sup>1</sup>

The 5th Amendment, as such, applies to takings by the United States. However, the provisions of the 5th Amendment are made applicable to the states by the 14th Amendment.

2. Before we can determine whether a taking of property has occurred, it would be convenient if we could come up with a working definition of the word "property." However, the generally-used definitions don't help all that much.

A standard definition which might be developed in a Property I course is that property encompasses that package of rights, privileges, powers and immunities which the law will protect or enforce.

This is a relativistic, result-oriented answer and depends on what the courts (and the legislatures) will decide is worthy of protection. More importantly it shows the great difficulty in defining property. If a court decides that a taking has occurred, then the claimant obviously had property rights. However, if the court decides that a taking has not occurred, then the claimant does not have property rights, or at least not a significant enough property interest that it should be protected.

3. Another answer which might be developed in a Property I course is that property is a package of rights, privileges, powers and immunities with regard to a thing (i.e. property is bundle of sticks). It is not the thing itself. Thus, a taking might occur if there is a taking of one or more of those rights, privileges, powers and immunities (i.e. sticks).

But we all know that takings don't occur just because one of those sticks is taken. Clearly, traditional zoning is a valid process, but by restricting what a person may do with regard to his or her land the regulation has removed one or

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<sup>1</sup> The due process clause, also contained in the 5th Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

more of the sticks from that person's bundle. Why doesn't that amount to a compensable taking?

Perhaps this can be explained by observing that some of those sticks are more important than others. For example, the right to possession is so important that if it is invaded a taking has occurred even if the interference was otherwise rather slight.

Another way this result can be explained is that the taking of a single stick may not be sufficient to be compensable. However, if enough of the sticks are taken then a compensable taking has occurred.

4. The sum total of all of the rights, privileges, powers and immunities a person has in land does not give the landowner the absolute right to do anything he or she may desire on the land. Property owners are not only private persons, but also members of society. As such they owe duties to, and receive benefits from, that society. Thus courts have always held that property rights do not include the right to maintain a noxious use and that landowners may not use their land in such a manner as to cause a nuisance.

For example, in *William Aldred's Case*, 9 Co. Rep. 57, 77 Eng. Rep. 816 (1611), Benton used a portion of his land which was adjacent to Aldred's house for a pig sty. Benton argued that as a property owner he had a right to raise his hogs on his land and that Aldred "ought not to have so delicate a nose, that he cannot bear the smell of hogs . . . ." The court found that Benton's property rights did not include the right to use the part of his land next to Aldred's house for a pig sty. One property owner rights are not absolute and must be considered in relation to the rights of other persons. (To be discussed below is whether the noxious use test is the limit of the police power.)

5. Thus, the determination of the content of the package of rights, privileges, powers and immunities is accomplished by a balancing of the property owners interests with those of other members of society. However, this does not mean that the balancing process is done on a simple or ordinary scale. While the benefits a person receives from a certain restriction, and the duties that he or she owes to society should be added to the scale, no amount of these considerations justify certain states actions without compensation.

For example, no matter how necessary it may be to build a public hospital, that need and public purpose does not justify the taking of a person's land without just compensation. This is the invasive taking for which there is always a requirement of compensation.

Also, issues of time and place should also be taken into this balance when determining whether there a compensable taking has occurred. For example, with increasing densities of population over the last hundred years, what might have been a valid balance of private property rights and societal interests a hundred years ago may not be the proper balance today. Furthermore, what

may be a proper balance in a densely populated area such as New York, may not be a proper balance in a low density area such as Dubois.

6. Certain situations may not require compensation no matter how invasive the imposition. These are based on special rules or constitutional principles.

For example, the U.S. Constitution gives the federal government the right to regulate interstate commerce. If a riparian landowner should have constructed a wharf on a navigable stream, the federal government may later require that the owner remove it and no compensation is necessary. *United States v. Willow River Power Co.*, 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101 (1945).

For example, under the emergency power, the government may destroy property rights in order to protect others from an even greater danger. The destruction is not a situation in which the government is taking the thing in order to make use of it. *United States v. Caltex*, 344 U.S. 149, 73 S. Ct. 200, 97 L. Ed. 157 (1952). Thus, the government may order trees, or even houses, to be destroyed in order to stop the advance of a devastating fire, or the destruction of cattle in order to prevent the outbreak of a serious bovine disease. *San Francisco fire case*

7. Regulatory takings cases can be broken down into two general groupings:

(a) regulatory prohibitions ("thou shalt not") – these might involve issues such as zoning limitations and environmental development prohibitions. In these cases the statute or ordinance prohibits the use or development in question.

(b) regulatory mandates ("thou shalt") – these usually involve mandatory dedications or exactions in order to develop on the land. The usual philosophical debate is over who should install and pay for certain improvements – the developer or the local government. Some examples might include:

- (i) streets or sewers in a new subdivision
- (ii) park site or school site (or an "in lieu" fee) in subdivision (especially a large one)
- (iii) fees for offsite improvements

Out of three of the most significant recent Supreme Court cases, two involved regulatory mandates and one involved a regulatory prohibition.

8. The process involved in most regulatory taking cases is not like the ordinary eminent domain case. In the ordinary eminent domain case the governmental unit determines that certain land is necessary for a particular project and then initiates condemnation proceedings. This places the government in the position of plaintiff, and the fact that a taking has occurred is a matter of public record. The issues that might be litigated are whether there is public use or purpose, and whether the compensation is just or adequate.

In a regulatory takings case the governmental unit does not view its action as amounting to a taking and therefore there is no proceedings initiated by the

government. If the affected landowner should believe that a taking has occurred it is up to her or him to initiate a suit against the government, sometime called an inverse condemnation action. The primary, if not sole, issue in these cases is whether a property interest was taken in the first place.

9. The debate on regulatory takings did not really begin until the late 19th century. Up until that time the police power was thought to include only the power to regulate common law public nuisances ("noxious uses") and the emergency power. By this time urbanization and industrialization had grown considerably, and along with it the outer fringes of the police power began to expand also. The noxious use requirement became more difficult to apply in a complex society. Interestingly, at the same time that the courts were expanding the outer limits of the police power, there also grew a recognition that substantive due process prohibited arbitrary and discriminatory interference with property rights.

10. From 1887 to 1928 the Supreme Court decided several significant cases in this area. Then from 1928 to 1978 the Court decided relatively few cases. Finally from 1978 to 1994 the Court again became quite active, with an interesting philosophical change in the middle of this period.

11. *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887).

In 1880 Kansas adopted a constitution which prohibited the manufacture and sale of liquor. Mugler owner a brewery which had been built in 1877. He was indicted under an 1881 statute which had been adopted to enforce the constitutional provision. The brewery cost \$10,000 and could only be used to brew beer. Mugler claimed that the 5th Amendment applied to the states and required that compensation be paid for diminishing the value of his property. The Supreme Court rejected the argument, considering the brewery to be a noxious use which could be regulated under the police power as a public nuisance.

Two views developed as to the proper interpretation of this case. Under the so-called broad view, the Court is considered to have given almost complete deference to the legislature. The only question is whether the regulation is a proper exercise of the police power. If so, then no compensation is due. This view does not hold that *Mugler* is limited to the suppression of public nuisances. Two consequences:

(a) The Court upheld the regulation of a use which was a nuisance or was nuisance-like. In *Reinman v. City of Little Rock*, 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915) the city banned the use of the plaintiff's livery stable under the police power as a nuisance, despite that fact that it was not a traditional nuisance. Also, in *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915) the Court permitted elimination of a brickyard which had existed for many years and around which the city had grown.

(b) The Court even upheld some regulations which were relatively far afield from traditional nuisances. *Powell v. Commonwealth of Pennsylvania*, 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253 (1888) (prohibition on the sale and manufacture of margarine); *Lawton v. Steele*, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894) (destruction of fishing equipment as a public nuisance); *Chicago, B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Comm'n*, 200 U.S. 561, 26 S. Ct. 341, 50 L. Ed. 596 (1906) (destruction of a railroad bridge to improve drainage).

However this view does not adequately account for several decisions which refused to uphold regulations under the police power.

*Dobbins v. City of Los Angeles*, 195 U.S. 223, 25 S. Ct. 18, 49 L. Ed. 169 (1904) (refused to uphold the declaration of a gasworks as a nuisance which was incompatible with the surrounding land use); *Curtin v. Benson*, 222 U.S. 78, 32 S. Ct. 31, 56 L. Ed. 102 (1911) (prohibitions on the grazing of cattle on private lands in Yosemite National Park were unconstitutional); *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32, 40 S. Ct. 76, 64 L. Ed. 121 (1919) (invalidated ordinance requiring the utility to remove its poles and wires in order to aid construction of a municipal utility).

Under the so-called narrow view which focuses on the attention paid by the Court to nuisance law in the case, the deference to legislative enactments in *Mugler* should be limited to situations where there is a public nuisance, or at least a near nuisance. Restrictions which do not fit in this category should receive a less deferential treatment. The enforcement of regulations in *Reinman* (livery stable) and *Hadacheck* (brickyard) are at least near nuisances and comply with this view. Also the denials of enforcement in *Curtin* (grazing) and *Los Angeles* (utility wires) were not nuisance-like and comply with this view. However, the enforcement of regulations in *Powell* (margarine), *Lawton* (fishing equipment) and *Chicago, B. & Q.* (railroad bridge) do not appear to comport with this view. *Dobbins* (gasworks) may be inconsistent since it might be viewed as nuisance like, but yet it applied a less deferential approach.

12. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922).

The Kohler Act prohibited underground mining of coal if it would cause a subsidence of the surface. The Mahon's predecessors had acquired and transferred only the surface estate and not a support easement for their surface interest. This was apparently a common situation in Pennsylvania. Pennsylvania Coal began to mine below the Mahon's surface estate and caused subsidence. The Mahons sought an injunction under the Kohler Act and Pennsylvania Coal argued that the act amounted to a taking of their property without just compensation.

Justice Holmes, writing for the majority, rejected the broad view of *Mugler* which would have given great deference to the legislature, even if the purpose of the act were beyond the proscription of a traditional nuisance. The Kohler Act was not merely a measure suppressing a nuisance. Indeed, he noted, public safety could have been achieved simply by requiring that notice be given to the landowner of the possible subsidence. Furthermore, damage to a single parcel was not a public nuisance. His views were more in keeping with the narrow view of *Mugler*. If the exercise of the police power is not limited to nuisance like activities it may amount to a taking.

However, the Court went on to indicate the difficulty of determining the dividing line between a taking and a proper exercise of the police power. "[W]hile property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." The Court refused to devise a specific test and stated "this is a question of degree — and therefore cannot be disposed of by general propositions."

13. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016 (1926).

This was the first Supreme Court decision to involve the now-traditional district zoning concept. The Village of Euclid was divided up with an overlay of use districts, height districts and area districts. As with all comprehensive zoning schemes today, only prescribed uses within certain bulk limitations are permitted on all parcels throughout a particular district. No administrative or legislative adjudication is made as to each parcel.

The Court upheld the facial validity of the zoning ordinance. The ordinance did not amount to a taking. What the ordinance regulated were near nuisances on a district wide basis. It is hard to say whether the case supports the broad or narrow of *Mugler*. Although the use involved was not a public nuisance, it might be considered nuisance-like since it was in a residential area. (A pig in the parlor instead of a pig in the poke.) However, the Court gave great deference to the legislative determination of the regulatory scheme, at least in the sense of stating that the legislative action was entitled to the presumption of validity, and the burden of proof was on the person challenging the ordinance to show that the regulation was not reasonable.

14. *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928).

Nectow's land was split by a zoning district boundary. Part of it was unrestricted and the other part was zoned for residential only. Nearby were heavy industrial uses, as well as residential uses. Prior to the enactment of the ordinance the plaintiff had contracted to sell his lot for \$63,000 but lost the contract because of the zoning change. The master had found that the property had no practical use for residential purposes.

The Court found that the ordinance, as applied, was a taking without just compensation. Since there was no practical use of the property for residential purposes, the ordinance did not bear a substantial relation to the promotion of the public health, welfare, safety and morals. In other words, it so restricted the use of the land that no adequate return could be made on the owner's investment in the property. (Compare *Lucas v. South Carolina Coastal Council*, *infra*.)

15. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

The New York City Landmark Preservation Law classified Grand Central Station as an historic landmark. Penn Central wanted to sell the air rights above the terminal for development of an office building (on stilts). The Landmarks Preservation Commission denied the request because it would irreparably harm the appearance of an historic building. Penn Central challenged the law as a taking of its property without just compensation.

The Supreme Court decided that, under the facts of the case, no taking had occurred. This case might be viewed as setting the high-point in judicial deference to legislative determinations.

In an attempt to develop takings jurisprudence the Court set out three factors which it considered significant in determining whether a taking has occurred:

- (a) The economic impact of the regulation on the claimant;
- (b) The extent to which the regulation has interfered with distinct investment-backed expectations; and
- (c) The character of the governmental action.

**Economic impact** -- Here the court was referring to the extent of the reduction of the value of the property. However, this case brought out an important issue as to the meaning of property in the takings context. Since this case involved the transfer of air rights above the terminal, Penn Central had argued that the denial of development rights in that air space was a taking *in toto* of its property in that discrete portion of its premises. The Court responded by stating that it would not divide up a single parcel of land into discrete segments and determine whether rights in a particular segment had been taken. Rather it would focus on the claimants rights in the entire premises. See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962) (upholding an ordinance which prohibiting the continued use of a gravel pit if the excavation went below water table). Rather than determining what value was taken it wanted to determine how much value remained. Since Penn Central still had plenty of value in the terminal property, plus the fact that it was allowed to transfer its developable air rights to other buildings (including ones that it owned) in the vicinity, the economic impact was not so great as to be a taking.

**Investment-backed expectations** — Here the Court was referring the primary expectations which the investor had for acquiring the property. If it had invested money in acquisition or development of the property and then was denied its primary purpose, this might tend to show that a taking had occurred. The Court also noted that the expectations must be realistic enough to affect the purchase price and not merely be hopes or pipe dreams. Thus, little weight would be given to loss of future profits, unless they were relatively immediate and certain. Furthermore, if the land is already heavily regulated (e.g. in mid-town New York), then the landowner's expectations must be tempered by probable changes in land use ordinances. Under the facts of this case the Landmark Preservation Law did not interfere with Penn Central's primary expectation of continued use of the premises as a terminal.

**Character of governmental action** — Was there a physical invasion of claimant's property. As was developed more fully in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (ordinance requiring the placement of a small box and related wiring for cable television on the apartment house roof), any physical invasion, no matter how *de minimus* would be considered a taking and compensation would be required. In this case there was no physical invasion. The law had only prohibited the use of the air space. The Court also noted that governmental actions which may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute takings. See e.g. *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) (direct overflights of claimant's property, which was in the landing pattern of an airport, caused damage to claimant's chickens; the governmental action had not merely destroyed claimant's property, but was using part of it for overflights).

16. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987).

The Pennsylvania Bituminous Mine Subsidence and Land Conservation Act required coal companies to leave sufficient support for the surface estate. It provided that 50% of the coal beneath certain improvements could not be mined in order to prevent subsidence.

In a 5-4 decision the Court upheld the law which was very similar to the Kohler Act which had been held invalid in *Pennsylvania Coal Co. v. Mahon*. The Court held that this Act was not intended to benefit private parties, but rather to serve genuine, substantial and legitimate public interests in health, safety and environment. Furthermore, looking at the coal mining business as a whole, less than 2% of the coal would have to be left in place in order to comply with the Act. The Court held that the companies' reasonable investment-backed expectations were not unduly affected. It also rejected the argument that the 2% of the coal which could not be mined was a discrete segment apart from the whole which had been taken. The value which remained in the parcel rather than the value of what was taken must be considered.

17. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

Traditionally the claimant's remedy for a regulatory taking was merely the invalidation of the ordinance. The fact that the claimant was not able to use her property for the proposed use or development during the time of the dispute and litigation was not considered. In this case the Court held that the remedy was no longer merely invalidation, but also damages for a temporary taking. This would be the (fair rental) value of the property between the time of the enactment of the ordinance and the date of its invalidation. Municipal attorneys must now consider this issue when advising their Boards or Councils on the adoption of a particular land use regulation.

18. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). A "mandated regulation" case

The Nollans owned a beachfront cottage which they had rented for many years and which was now run down and could no longer be rented out. The property, along with several others, was located between two state park beaches. The Nollans wished to convert it into a larger residential structure which was more in keeping with the neighboring improvements. As part of the process they applied to the California Coastal Commission for approval of the conversion. Ultimately the Commission found that the new house would increase the blockage of views of the ocean, increase private use of the shore, and would cumulatively burden the public's ability to traverse to and along the shoreline. As a condition for approval it then required that the Nollans dedicate an easement for lateral access across the property from the mean high water mark to a seawall higher up the beach on their property. The Nollans challenged the dedication condition as a taking without just compensation. In a 5-4 decision, the Court agreed.

In effect, this case initiated a higher degree of scrutiny of the regulation under consideration. The Court will not give as much deference to legislative decisions as it had in the past. The legislative or administrative body's finding of fact or reasons for enactment will no longer be accepted with as much facial validity.

The Court noted that had California merely required the Nollans to dedicate an easement across their beachfront for public access and usage, rather than making it a condition of the building approval, no doubt it would have been a taking. A permanent physical occupation has occurred where individuals are given a permanent and continuous right to pass back and forth so that the premises may be continuously traversed, even though no particular individual is permitted to station himself permanently on the premises.

Whether mandating such an easement as a condition for the issuance of a land use permit depends on whether it substantially advances a legitimate state interest. Therefore there must be an inquiry into whether there is a

legitimate state interest and whether the connection between the regulation and the state interest satisfies the "substantially advance" test.

The Court assumed, without deciding, that there was a legitimate state interest in protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on public beaches. However, the Court did not find a sufficient nexus between the mandated dedication and the legitimate state interest. The exaction was not functionally connected with the proposed use or development of the land.

The Court noted that if the Commission had attached some condition which protected the ability of the public to see the beach (e.g. height limitation, sideyard requirement) or even prohibited construction altogether (query: what if prohibition denied landowner all beneficial economic use? compare *Lucas v. South Carolina Coastal Council*, *infra*), it would have been valid. Moreover, if it had required the Nollans to provide a viewing area for passersby, it would have been valid as a condition to a land use permit, even though it would have been a taking had it been a free-standing mandate. However, the Court could find no way in which the mandated dedication of a beachfront easement reduced obstacles to viewing the beach created by the new house. It also could not see how it lowered any "psychological barrier" to the use of the public beach or how it helped to remedy any additional congestion brought about by the construction of the house.

Quite frankly, the Court believed that the Commission was simply requiring the easement in order to allow access between the two state park beaches not too far distant on either side of their property.

The dissenters argued that the Court's new approach, which gave less deference to the legislative decisionmaking process, was a violation of the separation of powers. They also argued that the majority had separated and considered a discrete small segment (public easement), of which there had been a complete taking, rather than looking to the entire package of interests and asking whether there was sufficient value remaining in the property.

19. *Lucas v. South Carolina Coastal Council*, \_\_\_ U.S. \_\_\_, 12 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

The South Carolina Coastal Zone Management Act was enacted to protect certain critical areas such as sand dunes on barrier islands. Its primary effect was to keep undeveloped land in its natural state and to prevent further development of already developed parcels. Its primary purpose was the reduce the substantial beach erosion which had been occurring.

In 1986 Lucas, a developer, purchased two lots on the Isle of Palms for \$975,000. These lots were on a barrier island and near the beach but not in the then-designated critical area. His plan was eventually to build single family homes on each of the lots. (They were just about the only lots left on the Isle of

Palms that were not developed.) In 1988 the Beachfront Management Act was adopted which allowed the Coastal Council to place other lots, including Lucas', in the critical area, which it did. At that time Lucas brought a suit challenging the designation as a taking. He did not challenge the power of the South Carolina legislature to adopt a law protecting the beaches, but merely the application to his property. The trial court found that the prohibition had denied Lucas of any reasonable economic use of the lots and further that it rendered them valueless. The South Carolina Supreme Court reversed holding that Lucas had failed to challenge the validity of the Act itself. The United States Supreme Court reversed in a 6-3 decision and found that a taking had occurred.

A Taking Occurs IF: { The Supreme Court noted that prior decisions revealed two discrete kinds of regulatory action which are compensable without regard to whether the public interest is advanced by the restraint: (a) physical invasion (except when there is a sufficient nexus with the construction or use on the land?), and (b) regulation which denies all economically beneficial or productive use of the land.

In a footnote the Court said that it was unclear from prior cases whether the denial of all economically beneficial use was based on the denial of all economically beneficial use of the burdened portion or of the tract as a whole. (This seems to be contrary to the Court's holding in *Penn Central*.) In any event a decision on that issue was not necessary in this case since the application of the Act had left Lucas without any economically beneficial use of the entire lot.

The Court suggested several justifications for finding a taking when there has been a denial of all economically beneficial use:

- ★ (a) It's the equivalent of a physical taking.
- (b) In that case it's less realistic to indulge in the usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner to secure an average reciprocity of advantage to everyone concerned. *↘ 'No balancing going on'*
- ★ (c) The concern that government would not be able to function if it had to pay for every adjustment or regulation adopted does not apply in the relatively rare situations where the government has deprived the landowner of all economically beneficial use.
- (d) Regulations that leave the owner without any economically beneficial use carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

The Court found that a test based on the denial of all economically beneficial use to be more expansive than the traditional "noxious use" principle. The "noxious use" principle was simply an early statement of the requirement that the regulation must substantially advance a legitimate state interest as announced in *Nollan*. This seems to adopt the broad view of *Mugler*. There are

certainly legitimate state interests which are beyond the prevention of noxious uses. However, in this case the denial of all economically beneficial use limits the exploration of other legitimate state interests.

The Court also did not think that the doctrine which states that a regulation only requires compensation when it is designed to confer a benefit on the public, and not when its goal is only to prevent harm was very usable since two persons might have such differing opinions as to whether the regulation confers a benefit on the public or only prevents harm. Finally, the Court stated that the definition of property interests is essentially up to the states. Thus, if under traditional state law principles of nuisance or property law the nature of permitted action does not include the use in question, then there has been no taking. (This statement seems to raise the question with the definition of property discussed earlier – if property is what the courts define it to be, then when is there a taking? Is it really true that if South Carolina found that its traditional nuisance or property law did not allow a person to build on sand dunes, there would be no taking (of course, other had been allowed to so build)?)

Consider the *Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 115 S.Ct. 1313, 131 L.Ed.2d 195, 63 USLW 3657 (1995).

20. *Dolan v. City of Tigard*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

The City of Tigard Community Development Code (CDC) required that land in the Central Business District have 15% open space. After a transportation study the City adopted a plan for a bicycle/pedestrian pathway to encourage alternative methods of travel to automobiles. The CDC required owners of land on which there was new development to help facilitate the plan by dedicating land for that plan. The City's Master Drainage Plan required that the Fanno Creek floodplain remain free of construction and that property owners along the Creek pay more (i.e. dedicate an easement in the basin to the City) since they were more benefited.

Dolan wanted to double the size of her plumbing and electric supply store. She also wanted to pave a 39 space parking lot, and later to build another store and parking area on the parcel. The City granted her a building permit for the new store and parking area but conditioned it on her dedication of a permanent easement in the floodplain across her land to the City in which would also be located a bicycle/pedestrian path. In all, the area affected by this easement was approximately 15% of her land and this also met the open space requirement. The requirement was approved by the Board of Appeals and the state courts. The Supreme Court reversed and held that the dedication requirements constituted an uncompensated taking.

The Court noted that had the City required the dedication without granting the building permit, there would undoubtedly have been a taking. Again the

question was whether there was a sufficient nexus between the proposed development and the dedication to justify it. The Court noted that merely conditioning the permit on the dedication did not make the requirement valid. It applied the doctrine of "unconstitutional conditions" and stated that the government may not require a person to give up a constitutional right (i.e. to just compensation) in exchange for a discretionary benefit conferred by the government where there is little or no relationship between the condition and the benefit.

In *Nollan* the essential nexus between the condition and the legitimate state interest was not found because the lateral easement could not be shown to advance the government's interest in providing an ocean view which the house blocked. However, that minimal "essential nexus" was present in this case since the Court could accept, in principle, the idea that there was a connection between the floodplain dedication and the prevention of flooding, and also that there was a sufficient connection between the requirement of a bicycle/pedestrian path and the reduction of automobile traffic.

However, the Court now introduced a new requirement. If the first test is passed, there must also be a "rough proportionality" between the condition exacted and the nature and extent of the development's impact. This two step approach involves, in effect, a "facial" showing of validity, followed by an "as applied" showing.

The Court then stated that the burden of proof for demonstrating the "rough proportionality" in cases such as this rests on the City. Justice Stevens, in his dissent, rigorously objected. He asserted that this was a violation of the separation of powers and further that it was a complete reversal of all prior case law which had given the presumption of validity to legislative enactments. (It is an interesting bit of irony that the Oregon Supreme Court had applied a similar burden of proof on Oregon cities about 25 years earlier. *Roseta v. County of Washington*, 254 Or. 161, 458 P.2d 405, 40 A.L.R. 3d 364 (1969).) The majority's response was to note that this shifting of the burden of proof did not apply to the evaluation of zoning regulations of general applicability, where there would be a legislative enactment. Only in cases where there had been an adjudicative decision, such as here, would there be a shift in the burden of proof. The Court did not explain what kind of adjudicative decisions were included in this requirement, but presumably it would involve any decision of an administrative agency such as those of a Board of Zoning Appeals, or even those of an elected legislative body. Therefore all denials of variances, special permits, conditional use permits, permits for Planned Unit Developments, etc. would be impacted, whether granted by a Board of Zoning Appeals or the City Council.

The Court then examined the specific facts. It agreed that adding an impervious surface would increase the quantity and rate of storm water runoff. Thus, it was important to keep the floodplain open. However, Justice Rehnquist

## The Law of Regulatory Takings

burden is on the city  
whenever there is an  
adjudicative decision Page 14

could not see why an easement had to be dedicated to the public, when it could be kept open by a land use regulation without a change of any title. He said that Dolan's right to exclude others from her land was taken as to the floodplain area. With the dedicated easement recreational users could use the floodplain even if she did not want them there. Thus, there was no "rough proportionality" between the state interest and the degree of exaction. Perhaps this "rough proportionality" test also means that the city must use the minimum interference necessary to achieve the legitimate state interests.

a new requirement) As to the bicycle/pedestrian path, Justice Rehnquist again agreed that there was an essential nexus between the state interest and the exaction, but the City had failed to show a "rough proportionality" between them. The exaction was excessive. Although the City could show how many more trips there would be to the new store, it did not show how the bicycle/pedestrian path would alleviate the traffic. (Perhaps pedestrians and bicyclists don't buy plumbing supplies?) In fact the Court emphasized the fact that the City's findings merely stated that the bicycle/pedestrian path "could" offset some of the traffic demand and lessen the increase in traffic congestion."

Justice Stevens was also concerned, in his dissent, because this case might overrule *Penn Central* on two related points:

- (a) This case looks at what was taken and not at what value was left in the land after the requirement was imposed.
- (b) This case looks at the situation as a taking of a neatly tailored interest in land and not at the total picture.

21. Summary – where do these cases leave us? It's not easy to ascertain rules from these cases, but some guidelines or rules of thumb are suggested:

(1) If the regulation amounts to an invasive use of the property, then a taking has occurred.

(2) If the regulation denies all economically beneficial use of the land, then a taking has occurred.

(3) If (1) or (2) are not applicable, then the Court will look at the following issues:

- (a) economic impact of the regulation (aside from denial of all economically beneficial use);
- (b) extent to which the regulation has interfered with investment-backed expectations; and
- (c) character of governmental action (aside from a physical invasion of the property).

\* (4) It's not clear whether one must look to the landowners remaining rights in the entire property, or whether one may look to the taking of discrete property interests.

(5) If (1) and (2) are not applicable, it seems that a balancing of interests is still involved – legitimate state interests balanced against the regulation's economic impact, its effect on investment-backed expectations, and the character of the governmental action. While legitimate state interests are to be considered, those interests are not limited solely to preventing nuisances or noxious uses.

(6) If a regulatory mandate is involved (does the following have potential application beyond regulatory mandates?):

- (a) there must be a legitimate state interest;
- (b) there must be an essential nexus between the legitimate state interest and the mandated dedication or exaction; and
- (c) there must be a rough proportionality between the mandated dedication or exaction and the nature and extent of the development's impact.

(7) If a regulatory mandate is the result of an adjudicatory process, the burden of proof is placed on the governmental entity asserting the mandate.

22. Some issues or observations:

(1) In lieu fees (which are very common) – will need some rationale (formula?) to justify the allocation of the fees to various developments.

(2) Mandatory dedications – will need some allocation between the developer and the public.

(3) The job of city and county attorneys, planners and commissioners is more dangerous and difficult. The cost of an error is immediate and potentially serious.

(4) Does the shift of the burden of proof to the government apply only when there is an exaction?

**PALM LIVESTOCK CO.**

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JULY 13, 1995

Testimony for the

**House Committee on Resources  
Task Force on Private Property Rights**

Monday July 17, 1995

My name is Brad Palm, I am a third generation rancher from Elk Mountain, Wy where my family and I currently run a 4,000 to 5,000 head range sheep operation. We have both Bureau of Land Management Section 3 lands in the checkerboard along the Union Pacific railroad as well as United States Forest Service permits on the Snowy Range of the Medicine Bow National Forest in Southern Wyoming.

There are three areas that I would like to submit testimony on that have had an economic impact on my ranch. The first and most economically devastating is predators, the second is how the Forest Service has cut allotments without scientific data, and the third is reclamation laws pertaining to coal mining on checkerboard lands. All three of these topics have about the same time frame in history with Palm Livestock Co., starting in the early seventies.

Ironically, I started helping manage the sheep on our ranch in 1972, just about the same time as former President Nixon signed an executive order banning the use of compound 1080. With the loss of this and most other predacides I have seen the number of lambs lost on our ranch to predators rise from about 5% in the early seventies to over 21% last year. When I talk about predator losses I'm talking about eagles as well as coyotes and other four legged predators. At least with

coyotes we still have some control methods available to try and reduce our losses. With eagles there is no recourse and we are forced to suffer those losses.

We run a range sheep operation. By this I mean we have herders with our sheep and run on open range with very few fences. We time our lambing season to coincide with green grass and warm weather. Because our ranch is in a natural wintering area for eagles we suffer tremendous losses to them during lambing in the early spring. Because a ewe only breeds for six months of the year and we already breed at the very end of her cycle it is either economically unfeasible or naturally impossible to change when we lamb to avoid eagle depredation. In the mid-seventies the United States Fish and Wildlife Service did some depredation studies on our ranch to study coyotes. They had a graduate student there for three lambing seasons doing nothing but counting dead lambs and determining what was the cause of death. Although it was never published, in conversations with him he said that eagles were killing as many lambs as coyotes at that time. Since then the situation has only worsened. It has gotten to the point that last winter I lost several full grown ewes to eagles and even a two month old great pyrenees guard dog pup.

We have our own airplane and my son and I do much of our own predator control with it. Our base property consists of roughly 56,000 acres of checkerboard land. Since the first of January we have taken 120 coyotes on that land. This doesn't include the coyotes the federal trapper has taken out of there as well. This, I think, gives you some idea of the population densities we have in Wyoming and why predators are such an economic burden to sheepmen.

Most of the discussion so far has centered around the base property since this is where the Sheep spend most of the year. I have included two pages of tables showing actual counts and losses on our forest allotments since 1986. I would call your attention to the last four columns of this table. These are the ewe and lamb losses and the percent that they represent of the total number of head. The percentage of ewes lost has remained fairly

constant, between one and two percent. One percent is a normal loss to natural causes for both ewes and lambs. Those years where we have lost more than one percent of the ewes are when we have had bear problems. The percent of lamb losses on the other hand have shown a steady increase since 1986 with the exceptions of 1990 and 1991. These are the first two years we had guard dogs with our bands. We are still using guard dogs but, as you can see from the loss figures, the coyotes have learned how to outsmart the dogs and have continued to kill. This I think illustrates the problem with nonlethal control methods. Unless there is some viable form of population control to reduce predator populations to a manageable level, nonlethal methods will not work.

Our forest allotments range in elevation from 9,500 feet to above 11,000 feet. The terrain is rugged and in many places heavily forested. Added to that is a "Scenic Byway" running through the middle of them. Because of the ruggedness of terrain and the high recreation use, most available control methods are either impractical or are not allowed by the Forest Service. Because of the high predator losses suffered on the forest over the last three years I, for the first time in my life, have chosen not to go to the forest this summer. Thanks to good spring moisture on the ranch I have enough forage to remain there this summer.

This brings me to the second part of my testimony. That is the Forest Service's decision to arbitrarily reduce the number of allotments on the forest and the effect that has on base property values.

Since 1970 I have seen the number of sheep allotments on the Snowy Range of the Medicine Bow Forest reduced from 14 to 8. Each allotment is for a thousand head of ewes and lambs for two months. This equates to a reduction of 2,400 animal unit months (the amount of forage necessary to feed a cow and calf or 5 ewes and lambs for 1 month) or 200 animal units (the amount of forage necessary to feed a cow and calf or 5 ewes and lambs for a year). Ranches are generally valued by animal units. Current ranch values are from \$1,500 to \$2,500 depending on the amount of federally controlled land on the ranch. Using

\$1,500 as the value for the animal unit reduction on the forest that equates to a \$300,000 loss in value.

There are basically three ways to acquire forest permits; by buying the base property attached to the permit, purchasing the animals, or agreement of the current permit holder. All of these take Forest Service approval. With the loss of 1080 in 1972 some of our neighbors decided to get out of the sheep business. Palm Livestock Co. was in a position at that time to purchase these sheep. There were four permits attached to the sheep we bought. Although we had enough base property to support the additional permits, the Forest Service denied the transfer. Their reasoning was that Palm Livestock Co. already had the maximum number of permits allowed under Forest Service regulations. However, we were allowed to utilize these four permits for two years under temporary use permits. Ultimately the Forest Service combined the four permits into one for 1,000 ewes and lambs and exchanged it for a permit that Palm Livestock Co. already had. This permit was in an area of high recreation use and was canceled once the Forest Service exchanged it. The net result of this action was that Palm Livestock Co. purchased 4,000 sheep and didn't gain a single forest permit. This reduced the carrying capacity of the ranch by 1,600 AUMs (133 animal units) as we had to keep those 4,000 sheep on the ranch after having gone to the forest for 2 years with them. The loss of 133 animal units of forage at \$1,500/unit equates to roughly a \$200,000 devaluation in the overall carrying capacity of the ranch. This was not the last time the Forest Service did this to Palm Livestock Co.

In 1991 Palm Livestock Co decided to split into smaller ranches to avoid conflicts between family members. In the process of doing so it required transferring forest permits from the parent company into the spinoff companies. Although ownership of the ranches and federal permits remained in the same family technically, according to the Forest Service, there was a transfer of forest permits. The Forest Service took this opportunity to try and reduce the number of permits Palm Livestock Co. had by another 2,000 sheep. These permits were along the "Scenic Byway" that crosses Snowy Range and are

subject to tremendous recreation use. Knowing that the Forest Service would probably try to eliminate these permits, I had asked the County Agent to do some forage utilization studies on them. What those studies showed was that we were only getting about 23% utilization at the current level of sheep numbers. This was brought to the attention of the Forest Service during the discussions we had with them over their wanting to eliminate sheep from this high recreation use area. When asked what their basis for eliminating these permits was they said that they received several complaints each year from the public. When asked how many complaints they said approximately 35. When asked to produce these complaints they said that the complaints were mostly verbal and refused to produce any evidence of them. Ultimately, the Forest Service reduced the permit by 1,000 sheep. Their reasoning being that since the Forest Plan for the Snowy Range called for an emphasis on recreation they were justified in cutting the permitted number of sheep to avoid conflicts with recreationists. The net affect of their decision on the Palm ranches was to further reduce the value of our over all carrying capacity by an additional \$50,000.

Another area of contention I have with the Forest Service is a cabin that Palm Livestock Co. built in 1948 when they first acquired the sheep permits on Snowy Range. This cabin was built to service the three permits originally held along the "Scenic Byway". This was back before there was a paved road across Snowy Range. According to Forest Service regulations private ownership of range improvements isn't recognized. Even though Palm Livestock Co. built and has paid taxes on this cabin since 1948 the Forest Service doesn't recognize our ownership of it. If we were to lose the permits that this cabin services we would also lose the cabin. This almost happened in 1992 when the Forest Service tried to cancel the permit that this cabin sits on.

The last area I would like to comment on has to do with reclamation laws. I believe the original intent of these laws was good; to ensure that when the land was disturbed for mineral development or other purposes that it be returned to a productive state when the disturbance was

finished. However, as with many well intentioned laws, the regulations promulgated to carry out the laws have gone too far.

My ranch lies west of the town of Hanna, Wyoming in what is known as the Hanna Basin. There is a tremendous coal reserve in this area. My ranch is checkerboard with surface ownership alternating every other section. However, when the Union Pacific railroad originally sold these lands they retained ownership of the minerals under the lands I now own. In the mid-sixties there was a coal boom in Hanna and several companies developed the coal reserves under Palm Livestock Co. lands. This boom lasted about twenty years and while there are still two mines in operation near Hanna they, too, are about finished. Most of the mines in the Hanna area are strip mines where large draglines are used to remove the dirt from the coal beds. If you have ever seen a strip mine you know that they put a lot of land out of forage production. To date roughly 25% of my land has been mined. Since Palm Livestock Co. doesn't own the minerals our compensation for the loss of productivity has been what are known as disturbed acre payments. These payments are made based on the tonnage of coal removed from under our surface ownership. This compensation was adequate while the mines were in operation. My problem has come after the mines are finished and the reclamation is completed. One mine on my ranch has been closed and reclamation finished since 1985. By law these reclaimed lands are removed from grazing until certain standards are met and the mine has gotten its reclamation bond released. Because of the strict standards these coal mines are required to meet, this mine still hasn't received bond release. This has put a good part of my ranch out of production for nearly thirty years now and best estimates are that the mine is still a year and a half from bond release. Ironically, this same mine had a portion of it's reclamation completed before 1979, when the stricter regulations took effect, and that portion has been returned to active use since shortly after reclamation was completed on it. About the only difference I can see between the reclaimed land we have been using and that which we haven't is the brush that the mine has been required to plant. That is another

problem I have with the reclamation laws. They require a certain brush density on all reclamation regardless of whether the surface owner wants it or not. The strip mines on my ranch are up to four miles in length but, only one quarter of a mile wide. There is sage brush on either side of them and the last thing I need is more sage brush!

In summary the actions of the Federal Government since 1972 have cost Palm Livestock Co. in excess of \$1,000,000 in lost revenues and land devaluations. By far the largest economic loss has been caused by predators, primarily coyotes and eagles. In just the past eight years predators have cost me over \$300,000 in lost lamb sales. The actions of the Forest Service in cutting permitted sheep numbers has cost Palm Livestock Co. \$250,000 in lost carrying capacity. The inability of the coal mines to achieve reclamation bond release has devalued my ranch to the point that when I applied to the Wyoming Farm Loan Board for a loan on the ranch they requested that I withdraw my application until such time as the mine had released its reclamation back to productive use. At an estimated value of \$35 an acre the private land still not released for grazing is worth roughly \$70,000.

As you can see the three areas I have addressed are placing an extreme economic hardship on my ranching operation and making it difficult to maintain a viable sheep ranch. I hope this testimony helps and if I can be of any further assistance please feel free to contact me. Thank you for this opportunity to submit testimony.

## SHEEP &amp; LAMB LOSSES ON FOREST ALLOTMENTS

MOUNTAIN BANDS-ON				1986 MOUNTAIN BANDS-OFF		LOSS		PERCENTAGE LOSS	
EWES	LAMBS	%AGE	ALLOTMENT	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS
977	915	0.94	Nelson Park	1,030	890	53	(25)	5%	-3%
1,149	1,051	0.91	Libby Flat	933	851	(216)	(200)	-19%	-19%
1,062	1,053	0.99	Libby Flat	1,126	981	64	(72)	6%	-7%
913	858	0.94	Sheep Lake	1,110	1,074	197	216	22%	25%
926	916	0.99	Headquarters Park	911	874	(15)	(42)	-2%	-5%
943	913	0.97	Reservoir Lake	808	751	(135)	(162)	-14%	-18%
5,970	5,706	0.96		5,918	5,421	(52)	(285)	-1%	-5%

MOUNTAIN BANDS-ON				1987 MOUNTAIN BANDS-OFF		LOSS		PERCENTAGE LOSS	
EWES	LAMBS	%AGE	ALLOTMENT	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS
725	765	1.06	Headquarters Park	711	709	(14)	(56)	-2%	-7%
839	863	1.03	Libby Flat	824	817	(15)	(46)	-2%	-5%
856	963	1.13	Nelson Park	820	902	(36)	(61)	-4%	-6%
907	1,025	1.13	Libby Flat	894	990	(13)	(35)	-1%	-3%
868	883	1.02	Sheep Lake	862	831	(6)	(52)	-1%	-6%
452	447	0.99	Reservoir Lake	435	422	(17)	(25)	-4%	-6%
4,647	4,946	1.06		4,546	4,671	(101)	(275)	-2%	-6%

MOUNTAIN BANDS-ON				1988 MOUNTAIN BANDS-OFF		LOSS		PERCENTAGE LOSS	
EWES	LAMBS	%AGE	ALLOTMENT	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS
931	969	1.04	Libby Flat	895	910	(36)	(59)	-4%	-6%
947	910	0.96	Libby Flat	888	852	(59)	(58)	-6%	-6%
865	1,126	1.30	Sheep Lake	800	907	(65)	(219)	-8%	-19%
796	867	1.09	Nelson Park	818	843	22	(24)	3%	-3%
1,157	1,138	0.98	Headquarters Park	1,307	1,234	150	96	13%	8%
1,456	Dry/Yrlg		Trail Creek	1,181		(275)	0	-19%	ERR
1,243	Dry/Yrlg		Reservoir Lake	1,183		(60)	0	-5%	ERR
1,230	Dry/Yrlg		Copper King	1,382		152	0	12%	ERR
8,625	5,010	1.07		8,454	4,746	(171)	(264)	-2%	-5%

MOUNTAIN BANDS-ON				1989 MOUNTAIN BANDS-OFF		LOSS		PERCENTAGE LOSS	
EWES	LAMBS	%AGE	ALLOTMENT	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS
926	967	1.04	Libby Flat	955	974	29	7	3%	1%
1,014	980	0.97	Headquarters Park	1,068	954	54	(26)	5%	-3%
846	919	1.09	Reservoir Lake	691	700	(155)	(219)	-18%	-24%
1,022	1,046	1.02	Nelson Park	1,020	936	(2)	(110)	-0%	-11%
1,113	1,141	1.03	Libby Flat	1,073	1,105	(40)	(36)	-4%	-3%
1,058	1,076	1.02	Sheep Lake	1,024	1,020	(34)	(56)	-3%	-5%
1,152			Copper King	1,140		(12)	0	-1%	ERR
1,656			Trail Creek	1,652		(4)	0	-0%	ERR
8,787	6,129	1.03		8,623	5,689	(164)	(440)	-2%	-7%

PALM LIVESTOCK CO.

## SHEEP &amp; LAMB LOSSES ON FOREST ALLOTMENTS

MOUNTAIN BANDS-ON				1990 MOUNTAIN BANDS-OFF				LOSS		PERCENTAGE LOSS	
EWES	LAMBS	%AGE	ALLOTMENT	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS
967	1,068	1.10	Nelson Park	892	979	(75)	(89)	-8%	-8%		
886	928	1.05	Sheep Lake	704	762	(182)	(166)	-21%	-18%		
947	1,064	1.12	Libby Flat	1,004	1,089	57	25	6%	2%		
938	968	1.03	Headquarters Park	871	852	(67)	(116)	-7%	-12%		
844	929	1.10	Reservoir Lake	843	874	(1)	(55)	-0%	-6%		
947	1,050	1.11	Libby Flat	1,130	1,269	183	219	19%	21%		
1,601	54	0.03	Trail Creek	1,580	32	(21)	(22)	-1%	-41%		
1,258	20	0.02	Copper King	1,256	14	(2)	(6)	-0%	-30%		
8,388	6,081	0.72		8,280	5,871	(108)	(210)	-1%	-3%		

MOUNTAIN BANDS-ON				1991 MOUNTAIN BANDS-OFF				LOSS		PERCENTAGE LOSS	
EWES	LAMBS	%AGE	ALLOTMENT	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS
1,095	1,168	1.07	Nelson Park	1,100	1,100	5	(68)	0%	-6%		
964	1,042	1.08	Libby Flat	1,021	1,053	57	11	6%	1%		
1,022	1,165	1.14	Libby Flat	996	1,083	(26)	(82)	-3%	-7%		
979	1,066	1.09	Sheep Lake	969	1,070	(10)	4	-1%	0%		
1,173	1,131	0.96	Headquarters Park	1,134	1,184	(39)	53	-3%	5%		
1,156	1,200	1.04	Reservoir Lake	1,089	1,078	(67)	(122)	-6%	-10%		
6,389	6,772	1.06		6,309	6,568	(80)	(204)	-1%	-3%		

MOUNTAIN BANDS-ON				1992 MOUNTAIN BANDS-OFF				LOSS		PERCENTAGE LOSS	
EWES	LAMBS	%AGE	ALLOTMENT	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS
930			Nelson Park	925	10	(5)	10	-1%	ERR		
1,116	965	0.86	Libby Flat	1,114	919	(2)	(46)	-0%	-5%		
987	901	0.91	Sheep Lake	947	869	(40)	(32)	-4%	-4%		
1,223	1,167	0.95	Headquarters Park	1,195	935	(28)	(232)	-2%	-20%		
4,256	3,033	0.71		4,181	2,733	(75)	(300)	-2%	-10%		

MOUNTAIN BANDS-ON				1993 MOUNTAIN BANDS-OFF				LOSS		PERCENTAGE LOSS	
EWES	LAMBS	%AGE	ALLOTMENT	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS
1,037	1,108	1.07	Headquarters Park	984	974	(53)	(134)	-5%	-12%		
790	694	0.88	Reservoir Lake	812	690	22	(4)	3%	-1%		
1,827	1,802	0.99		1,796	1,664	(31)	(138)	-2%	-8%		

MOUNTAIN BANDS-ON				1994 MOUNTAIN BANDS-OFF				LOSS		PERCENTAGE LOSS	
EWES	LAMBS	%AGE	ALLOTMENT	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS	EWES	LAMBS
786	688	0.88	Nelson Park	732	599	(54)	(89)	-7%	-13%		
1,031	973	0.94	Libby Flat	1,034	857	3	(116)	0%	-12%		
1,277	590	0.46	Sheep Lake	1,194	529	(83)	(61)	-6%	-10%		
1,064	688	0.65	Headquarters Park	1,160	622	96	(66)	9%	-10%		
4,158	2,939	0.71		4,120	2,607	(38)	(332)	-1%	-11%		

PALM LIVESTOCK CO.



**PRESIDENT**

FRANK MOORE  
DOUGLAS, WYOMING

**PRESIDENT-ELECT**

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**WYOMING WOOL GROWERS ASSOCIATION**

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**SUPPLEMENTAL INFORMATION**

Testimony of  
the Wyoming Wool Growers Association  
on

"The Affect of Federal Laws and Regulations on Privately Owned Property"

submitted to the hearing of the  
U. S. House of Representatives  
Committee on Resources  
Task Force on Private Property Rights  
Monday, July 17, 1995  
Sheridan, Wyoming

prepared by:  
Bryce R. Reece  
Executive Director  
Wyoming Wool Growers Association  
307/265-5250  
307/234-4999 (fax)

This testimony will identify for the Task Force the problems faced by the Wyoming sheep industry due to the effects of predation and the resulting loss of private property to the sheep producers of the state. It will identify the major sources and reasons for this loss and the governmental actions and/or inactions which have brought about the current situation. Finally, the testimony will suggest certain courses of action which Congress can take to rectify its past actions which have caused the current problems faced by the industry.



PRESIDENT  
FRANK MOORE  
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## WYOMING WOOL GROWERS ASSOCIATION

611 N. GLENN ROAD • P.O. BOX 115 • PHONE (307) 265-8250 • FAX (307) 234-9701 • CASPER, WYOMING 82602

Testimony of  
the Wyoming Wool Growers Association  
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"The Affect of Federal Laws and Regulations on Privately Owned Property"

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Monday, July 17, 1995  
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prepared by:  
Bryce R. Reece  
Executive Director, Wyoming Wool Growers Association

Mr. Chairman, members of the committee-

My name is Bryce Reece. I am the Executive Director of the Wyoming Wool Growers Association (WWGA). I would like to preface my remarks by saying that if this hearing would have been held only two years ago, I would be testifying that I represent 1500 active lamb and wool producers of the state of Wyoming. As we meet here today, I have to tell you that I represent approximately 1,000 active producers. In the past two years, the sheep industry of my state has seen a dramatic decline in both sheep numbers and producers, due in large part to the main point of my testimony here today.

Since January of 1993, the industry I am employed by has seen a loss of over 500 active lamb and wool producers with a corresponding reduction of over 255,000 head of our producing ewe base. I want to stress that these animals are gone, out of production. Most have been sold for slaughter, most likely into Mexico. The point is that these animals have not simply been

moved to another state where they are still in production, but in fact the production from these animals has been lost for all time.

To put this into economic terms, our national organization, the American Sheep Industry Association, estimates that every producing ewe in this country generates conservatively \$600.00 in annual economic activity with the products she produces (lamb and wool) and she creates or maintains .031 jobs. What the loss of 255,000 head of producing animals in the state of Wyoming means to this state and to the American economy is a LOSS of \$153 million in economic activity and over 7900 jobs. That economic activity and those jobs are now being picked up by our foreign competitors. You may notice, coincidentally, that the decline in both Wyoming sheep and producer numbers coincides with the passage of the act by Congress to eliminate the Wool Incentive program. This is not a coincidence, but I am here to tell you that the action Congress took in 1993 to eliminate the 50 year old Wool Program IS NOT the direct reason we have seen 33% of our producers and 32% of our production base leave the business, or the state. The reason for the dramatic decline is the subject of my testimony today.

In both the fall of 1993 and 1994, the Executive Board of the Wyoming Wool Growers Association conducted tours throughout the state, hosting 15 "town meetings" each year. Producers were invited in to sit and discuss their problems and concerns with the Board and to gather a consensus of where the Wyoming sheep producers and industry was at on various issues of importance. Recall that the first series of "town meetings" was held during that period of time (fall of 1993) during which Congress was voting to eliminate the sheep industries government program to stabilize the industry. In response to questions by the WWGA Executive Board as to the most serious problem a sheep producers faces by being in the sheep business in Wyoming, the number one answer (surprisingly to some) WAS NOT the elimination of the Wool incentive program. The #1 problem, as identified by the producers themselves, was the effects and the loss to the producers from predators. This was upheld the following year, 1994, during the second set of town meetings.

According the Wyoming Agriculture Statistics Service/ United States Department of Agriculture 1994 Sheep Predator Loss Report (attached), the Wyoming sheep industry lost conservatively over 96,000 head of sheep and lambs to predators in 1994. The estimated value of this loss was \$4.23 million. The largest loss, by far and away, was due to the coyote, with 72% of the total loss. The second largest loss was attributed to the eagle, with 12% of the total. Eagle losses were then followed by losses fox, bears, mountain lions and then all other predators. Losses to eagles showed, for the second straight year, the largest single percentage increase and in fact losses attributed to eagles have increased 55% since 1990.

Based upon these statistics, it should become immediately evident why losses to predators is such a urgent concern for our industry. What is of greatest concern to our industry is our inability to deal with this escalating problem, and brings me to the reason for our testimony at this particular hearing.

The inability of our industry to deal with these losses is directly attributable to either the actions (in most cases), or inaction of the government which is supposed to represent us. The start of our inability to control the predator problem began in 1972 by the action of then President Richard Nixon. President Nixon, due to pressure from environmental groups whose main motivation then, as it is now, was to force the western livestock industry out of business issued Executive Order 11643 which banned the use of the compound 1080, the toxicant which the industry relied upon to keep coyote populations under control. At the time, the industry was assured by the Administration that "piles" of federal money would be forthcoming for use by both the industry and the federal agencies charged with mitigating damage by wildlife, as well as new control methods. Needless to say, we are still waiting for both.

The next action, or in this case inaction, by the federal government was the mid-1980's ban by the European Community on fur from most countries, including the United States. The European countries were one of the largest markets for coyote pelts, and when the EC unilaterally banned importation of furs from these animals (again at the insistence of radical animal rights and environmental groups) and the United States government did nothing, the market for these furs, and correspondingly the value for them, virtually ceased to exist. We can trace an increase in losses to our sheep and lambs directly to when the ban went into effect.

The next blow to our industry from the federal government came in 1992 when then acting BLM Director Jim Baca (again with pressure from radical environmental and animal rights groups) issued an order which stopped ALL lethal predator control on BLM lands in the west. This order hit the Wyoming sheep industry particularly hard as over 90% of the sheep in Wyoming are estimated to spend a portion of their lives on federal lands. This arbitrary order had only one intent, and that was to harm the western sheep industry. Mr. Baca, and his boss Interior Secretary Babbitt had and have continually shown themselves to be anti-livestock and anti-private property rights. Our industry, unfortunately, was the first resource industry picked to receive the first example of the heavy hand of the Clinton Administration.

In addition to these specific examples, there are many more examples of actions by our government which have served to increase our losses of our

private property. These examples include increasing restrictions on current predator control activities and methods, lack of needed and necessary research into new methods of control and management of predators, and continual decreases in federal support to the Animal Damage Control program of USDA. This program has been a vital and necessary part of the industry fight against these losses, but continuing lack of needed funding and increasing restrictions upon the program itself have rendered a once professional and effective program to one which is largely ineffective and tied down with bureaucratic restrictions to the point that we here in Wyoming are seriously considering asking Congress to allow the state of Wyoming to receive the current funding for the Wyoming federal ADC program and run the program ourselves.

In a bitter bit of irony, our own government, which is well aware of all of the problems our industry has, and is, faced with recently brought the sixth major predator of sheep back to our state for us, all at government expense. With the introduction of the wolf into Yellowstone, we know with certainty that it is only a matter of time until the wolf takes its place on the annual "Predator Loss Report." The question now becomes, will there be a recognizable Wyoming sheep industry in the state to help feed the government's wolves. I would point out that the Clinton Administrations Wolf Reintroduction plan, which brought the wolves to Wyoming, blatantly admits that livestock will be lost to wolves, yet the plan makes no money available to compensate for those losses. It relies, rather, on a private fund which is not bound by the plan and provides little more than "window dressing" for it. This is one of the primary issues which will be decided in the upcoming trial brought about as a result of the lawsuit filed by the American and Wyoming Farm Bureaus.

I would like to address one very disturbing and totally unfair aspect to this whole issue of losses to my industry from predators, and that is the issue of losses to the eagle. While the coyote, by far and away, is the most significant predator in terms of damage to the sheep industry, we at least are able to take, although limited and wholly inadequate action against the coyote to try to protect our livestock. This is not true in the case of the eagle,

I want to preface this by stating to you that losses to our industry from the Bald Eagle do not pose a significant problem, at least at this time. The out-of-control and increasing problems we are experiencing to eagles comes at the hands (or talons) of the Golden Eagle. Almost all of the loss attributed to eagles is a direct result of the Golden. The Golden eagle is one of the most, if not the most, efficient, destructive, cruel and vicious killers in Wyoming. This is a known and recognized fact.

The Golden Eagle is not a threatened or endangered species. Yet, the Golden Eagle receives full protection, along with the Bald Eagle, from the Bald Eagle Protection Act, which is based upon the Bald Eagle Protection Treaty ratified by Congress. What is not known is that the Golden Eagle was NEVER in danger of being either threatened or endangered in terms of population numbers. It is my understanding that the Golden received protection simply because it is difficult to distinguish between an immature Golden and an immature Bald. By virtue of this protection, we are left totally and completely defenseless and without any means to control or stop the loss from these animals. In fact, the few times members of our industry have finally reached the limits of human tolerance and have taken action themselves to stop these animals from killing their livestock, the heavy, non-understanding nor caring, hand of the federal government comes down with swiftness and with utterly no compassion. The agency which rides to the Golden's rescue is the U.S. Fish and Wildlife Service, and they do their job with zeal.

An example. Just recently, one of our organizations members was prosecuted for killing eagles which were killing untold numbers of lambs on his ranch. The Fish and Wildlife suspected him of killing 10 eagles, but eventually charged him with killing four. In what many of our members consider a somewhat questionable trial with questionable evidence, this producer was convicted and is currently serving a 15-month sentence in federal prison. The producer also received a substantial fine. It is conceivable that this family, which has never had any type of previous contact with the court system, may be forced to sell their ranch.

I want to state that the Wyoming Wool Growers Association has never in the past, nor will it in the future, condone any type of illegal activity, whether it be illegal killing of predators, falsifying Wool Incentive documents or any type of questionable activity. That does not mean, however, that we do not whole heartedly sympathize and understand the situation which the federal government has placed our producers in. Every day our producers who are experiencing losses to eagles are faced with having to make the choice of breaking several federal laws or simply watching their private property being removed or destroyed.

It must be stressed here that the Wyoming sheep producer receives NO compensation for losses from predators except in the case of Grizzly bears and mountain lions. In those cases, compensation comes only after documentation of the loss and then it is from the State of Wyoming, NOT from the federal government. Again, the irony and unbelievableness of this situation is that the Grizzly bear is a federally protected species, yet the state is forced to compensate for losses caused by it.

Mr. Chairman, members of the committee. The Wyoming sheep industry needs your help. This help can come in several forms. The first is by the federal government bringing back some common sense and reason to the whole issue of predators and their control and management. We do not support wholesale elimination of any species of animal. We do recognize, and hope you will also, that when these animals cause problems and take private property, they must be controlled. This control has to be in the form of effective, professional control with necessary and adequate methods and resources. Currently, this means lethal control. In order for this industry to survive, we must have an effective, legal method of lethal control. While it is our position that the one method which meets these needs, namely the return of the use of Compound 1080 in the form of drop baits, may not be politically feasible, there is another form of legally available 1080 which our industry would like to use. This is the 1080 collar, known as the Livestock Protection collar. Unfortunately, the restrictions which have been placed on the use of the collar by EPA have rendered it totally unusable by our producers.

Congress must renew its financial responsibility and commitment to the Animal Damage Control program. Currently, this agency has only a \$16 million dollar budget (outside of research) to deal with ALL of the wildlife related damage problems in the entire country. Their budget could very easily be doubled and still be barely adequate. The Animal Damage Control Act of 1931 established the ADC agency and mandated their role in controlling damage caused by vertebrate pests. While the damage has increased, ADC's budget has not kept pace. This MUST be reversed.

We need development of new, socially and politically acceptable methods of predator control and management. This requires both a commitment of both political and financial support from you, the members of Congress. Currently, financial support from the government is totally inadequate. TOTAL federal spending in this area is only \$10 million per year. In order to be effective, this figure needs to be at a minimum, twice this amount.

The above mentioned financial needs could be met by a program proposed by the Wyoming Wool Growers Association to attach the existing Wool Tariff funds for use by the sheep industry. It would require no tax payer dollars and the funds would be utilized by the states in the most efficient and practical manner possible where they are needed the most. We have presented this proposal to Congresswoman Cubin and would be glad to fully explain it to any members who may be interested.

I am here to ask you, on behalf of my industry, to please do something to remove the total protection the Golden eagle currently receives. We are not asking for a wholesale license to exterminate the Golden. We are asking for

the ability to control them when they are causing the horrendous losses that they do. In order for this to be successful, they have to be removed from the jurisdiction and authority of the U.S. Fish and Wildlife's authority. It is our experience that this agency is totally out of control. Employees of this agency have no regard for private citizens or the effects that the animals they have authority over cause. They value animals over people. Couple that with almost unlimited search and seizure powers, a virtual unlimited budget and access to automatic weapons and you have the makings of complete abuse of power and total overreaching by a government agency. This is exactly what we have seen here in Wyoming.

If Congress can not see its way clear to meet these suggestions, then it must accept complete and total financial responsibility for the damage caused by these animals, if we as an industry are to survive. The U.S. and Wyoming sheep industry is literally on the ropes. If Congress does not act to correct its past actions, this industry will, in and of itself, become an endangered species.

Thank you for the opportunity to present this information to you.

May 19, 1995

MEMORANDUM

TO: ASI Officers, Predator Management and Endangered Species Committee, Resource Management Council  
FR: Tom McDonnell  
RE: Eagle Killings

Attached is an article regarding the killing of eagles by a Wyoming sheep rancher. His sentence is light considering the cruelty he demonstrated towards the animals.

ASI's policy states the ASI does "not condone irresponsible or illegal efforts to control predation and damage to private property." In the case of the Wyoming rancher, ASI probably should condemn the action rather than not condone the act. However, this policy also states that while ASI realizes "that wildlife is a valuable public resource, it also realizes that wildlife must be responsibly managed to reduce damage to agriculture and private property." This section of ASI's policy must be examined so events such as the Wyoming incident are less likely to occur in the future.

Eagle predation on sheep and lambs is increasing nationwide. In the state of Wyoming, eagle predation has almost doubled (increased 82 percent) since 1990, and currently is responsible for 12 percent of their total predator losses and over \$540,000 in damage annually. Eagle predation on calves and wildlife is also increasing. A 225 lb. calf was killed in Montana in May of 1991. In New Mexico, a pair of golden eagles killed 6 calves and injured 48 other cows and calves. The cause of death of these animals was confirmed by ADC and local vets.

Surveys demonstrate that golden eagles are the major source of eagle predation. Animal Damage Control now estimates that there are 100,000 resident golden eagle's in the United States. This figure is confirmed by the U.S. Fish & Wildlife Service publication "North American Breeding Bird Survey Annual Summary 1990-1991" which shows that gold eagle populations have increased three percent annually since 1966. In addition to the resident eagle population, there is a high wintering golden eagle population that migrates down from Canada and Alaska each year. A Wyoming study counted over 10,000 native and migratory golden eagles within the state as far back as 1981. Much of this increase in golden eagle populations has been attributed to agriculture's development of reservoirs, and ag's improvement of prey species habitat.

Studies also indicate that golden eagle habitat in the United States is reaching a point of saturation. In 1987, state and federal studies indicated that golden eagle habitat in Montana and Wyoming was already saturated.

## Page 2, Eagle

Only four percent of the producers report that bald eagles are the sole cause of livestock predation. However, 34 percent of the those surveyed report both golden and bald eagles have caused predation losses. Since the ban on DDT in 1973, bald eagle populations have been doubling in size every 6 years (approximately 12 percent increase annually). In 1963 there were 417 pairs of bald eagles. By 1993 this number had increased to 4016 pairs and several thousand juvenile eagles in the U.S., for an approximate total of 10,000 bald eagles. Dividing the 500 bald eagle pairs known when the bald eagle was listed in 1975 by 0.02, the U.S. Fish & Wildlife Service estimated there were at least 25,000 bald eagle pairs in the year 1782. If bald eagle numbers continue increasing at the current linear rate, the bald eagle will reach its historic levels in 15 years.

The U.S. Fish & Wildlife Service proposed to down list the bald eagle from endangered to threatened in all but 3 of the 48 lower states in the fall of 1994. At the current rate of reproduction, the bald eagle could probably be delisted completely within the next several years and protected solely under the Bald Eagle Protection Act. However, environmental pressure is likely to complicate any such action.

To address the golden eagle predation issue, I believe ASI needs to look at provisions already established within the Bald Eagle Protection Act of 1940. This law contains provisions that allow specific permits to be issued by the Department of Interior to control predation of domestic livestock by golden eagles. The problem has been that the U.S. Fish & Wildlife Service has not issued such permits to the state or private individuals since 1970. If such permits were available once again, illegal acts which kill golden eagles would be less likely to occur, and the removal of golden eagles which specifically prey on domestic livestock would reduce economic losses incurred by the livestock industry.

In regards to the bald eagle, industry may wish to petition for delisting of the bald eagle within the next year should recovery continue at present levels. If the bald eagle is delisted, states or industry may be able to once again apply for take permits for individual problem bald eagles as well.

It is my recommendation to the ASI Predator Committee begin discussion with the U.S. Fish & Wildlife Service about issuing take permits on predating golden eagles as they once did. If this effort proves effective, it would move industry towards some resolution of the eagle predation problem. It is my recommendation to the Endangered Species Committee that ASI start investigating options for delisting the bald eagle.

## WYOMING AGRICULTURAL STATISTICS SERVICE



## SHEEP PREDATOR LOSS - 1994

NASS, USDA  
P.O. Box 1748  
Cheyenne, WY 82001

In cooperation with Wyoming Department of Agriculture

Dear Data Users,

This is the first of the two-stage annual report on sheep and lamb losses funded by the Wyoming Department of Agriculture. This report covers losses due to predators only. The full report which will include losses to all causes (predator and non-predator) will be released in April.

A survey of producers is conducted in early January and is used to estimate total sheep and lamb inventory on hand January 1 and to estimate sheep and lamb losses to all causes during the previous year. This year, over 750 producers responded to the survey. Inventory of all sheep and lambs totaled 790,000, down 3 percent from a year earlier. Breeding sheep inventory dropped 13 percent to 538,000 head. The 1994 lamb crop totaled 510,000 head, down 4 percent from 1993.

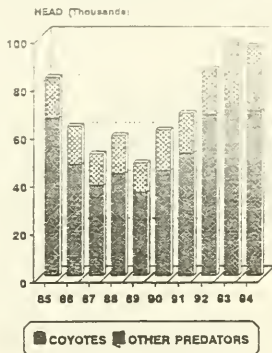
I thank you to all the Wyoming ranchers and farmers whose voluntary cooperation made this report possible. If you have any question about the report, please call toll-free at 1-800-892-1660.

Sincerely,

*Dick Coulter*

Richard W. Coulter  
State Statistician

ALL SHEEP & LAMB PREDATOR LOSSES  
Coyotes, Other Predators, and All Predators



## HIGHLIGHTS

**PREDATOR LOSSES DOWN 2 PERCENT:** Wyoming sheep producers lost an estimated 96,000 sheep and lambs to predators in 1994, down 2 percent from 1993 but still 11 percent higher than two year's earlier. Coyotes were again the main predator taking 72 percent of the total predator losses. Losses to coyotes were down 4 percent from 1993 but were 3 percent above 1992. Losses to eagles, at 12 percent of the total, showed the biggest percentage increase.

**SHEEP LOSSES UP 43 PERCENT:** The number of sheep lost to predators in Wyoming during 1994 rose 43 percent from 10,500 head to 15,000 head. Coyotes killed 11,500 adult sheep which is up 3,000 head from 1993. Losses to most other predators were also up. Coyotes accounted for 77 percent of the sheep losses to predators.

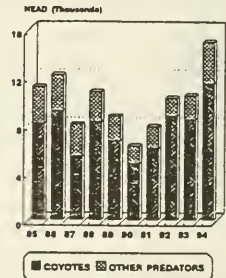
**ALL LAMB LOSSES DOWN 7 PERCENT:** Producers lost 81,000 lambs to predators before and after docking in 1994, 7 percent less than in 1993. Coyotes took 71 percent of the lambs lost to predators. Eagles were a distant second with 12 percent. Foxes were third at 11 percent. The 1994 lamb losses represent 14 percent of all lambs born, ("lambs born" includes both lambs docked and lambs that died before docking).

**VALUE OF PREDATOR LOSSES:** Sheep producers in Wyoming lost \$4.23 million from sheep and lamb deaths due to predators in 1994. This was up one percent from 1993's \$4.18 million due to larger losses and higher prices for mature sheep. Coyotes alone cost producers an estimated \$3.1 million.

Losses of Sheep Due to Predators:  
Wyoming, 1993 and 1994

Cause of Loss	1993		1994	
	Head	% of Total	Head	% of Total
Coyotes	8,500	81.0	11,500	76.7
Bobcats	—	—	200	1.3
Dogs	300	2.9	400	2.7
Bears	600	5.7	1,000	6.7
Eagles	200	1.9	1,000	6.7
Fox	200	1.9	100	0.7
Mountain	700	6.7	500	3.3
Other	—	—	300	2.0
Total	10,500	100.0	15,000	100.0

SHEEP PREDATOR LOSSES  
Coyotes, Other Predators, and All Predators



Losses of Lambs Due to Predators: Wyoming, 1993 and 1994

Cause of Loss	1993				1994			
	Before Docking	After Docking	Total Head	% of Total	Before Docking	After Docking	Total Head	% of Total
Coyotes	22,500	41,000	63,500	73.0	20,000	37,500	57,500	71.0
Bobcats	300	400	700	0.8	200	200	400	0.5
Dogs	200	400	600	0.7	200	200	400	0.5
Bears	—	500	500	0.6	200	1,400	1,600	2.0
Eagles	6,200	3,100	9,300	10.7	7,200	2,900	10,100	12.5
Fox	8,600	2,600	11,200	12.9	6,500	2,400	8,900	11.0
Mountain Lions	200	900	1,100	1.3	400	1,100	1,500	1.9
Other	—	100	100	0.1	300	300	600	0.7
Total Predators	38,000	49,000	87,000	100.0	35,000	46,000	81,000	100.0

Losses of Sheep and Lambs Due to Predators: Wyoming, 1990- 1994 1/

Cause of Loss	1990		1991		1992		1993		1994	
	Total Head	% of Total	Total Head	% of Total	Total Head	% of Total	Total Head	% of Total	Total Head	% of Total
Coyotes	43,900	72.1	51,300	75.6	67,300	78.0	72,000	73.8	69,000	71.9
Bobcats	100	0.2	200	0.3	300	0.3	700	0.7	600	0.6
Dogs	1,800	3.0	1,600	2.4	1,000	1.2	900	0.9	800	0.8
Bears	500	0.8	1,100	1.6	800	0.9	1,100	1.1	2,600	2.7
Eagles	6,100	10.0	4,300	6.3	5,400	6.3	9,500	9.7	11,100	11.6
Fox	7,200	11.8	7,000	10.3	9,200	10.7	11,400	11.7	9,000	9.4
Mountain Lions	1,100	1.8	2,200	3.2	2,000	2.3	1,800	1.8	2,000	2.1
Other Predators	200	0.3	200	0.3	300	0.3	100	0.1	900	0.9
Total Predators	60,900	100.0	67,900	100.0	86,300	100.0	97,500	100.0	96,000	100.0

1/ Includes all lamb losses both before and after docking.

Value of Losses of Sheep and Lambs Due to Predators: Wyoming, 1993 and 1994 1/ 2/

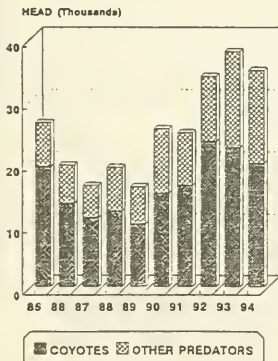
Cause of Loss	Sheep		Lambs		Sheep & Lambs	
	1993	1994	1993	1994	1993	1994
	Dollars					
Coyotes	569,500	787,800	2,559,000	2,300,000	3,128,500	3,087,800
Bobcats	—	13,700	28,200	16,000	28,200	29,700
Dogs	20,100	27,400	24,200	16,000	44,300	43,400
Bears	40,200	68,500	20,100	64,000	60,300	132,500
Eagles	13,400	68,500	374,800	404,000	388,200	472,500
Fox	13,400	6,800	451,400	356,000	464,800	362,800
Mountain Lions	46,900	34,200	44,300	60,000	91,200	94,200
Other Predators	—	20,600	4,000	24,000	4,000	44,600
Total Predators	703,500	1,027,500	3,506,000	3,240,000	4,209,500	4,267,500

1/Includes all lamb losses both before and after docking.

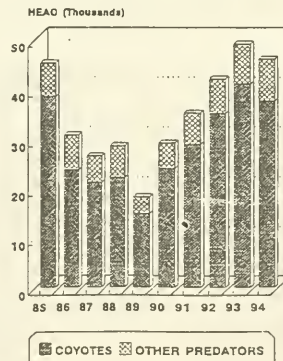
2/Sheep value is based on a two year average value per head of ewes 1+ years. Sheep value 1993-\$67.00, 1994-\$68.50. Lamb value per head is based on the annual average price received by farmers and ranchers for a 60 lb. lamb. Lamb value 1993-\$40.30, preliminary 1994-\$40.00.



LAMB PREDATOR LOSSES BEFORE DOCKING  
Coyotes, Other Predators, and All Predators



LAMB PREDATOR LOSSES AFTER DOCKING  
Coyotes, Other Predators, All Predators



UNITED STATES DEPARTMENT OF AGRICULTURE  
Wyoming Agricultural Statistics Service  
P.O. Box 1148  
Cheyenne, Wyoming 82003

OR OFFICIAL BUSINESS

BULK RATE  
Postage and Fees Paid  
U.S. Department of Agriculture  
Permit No. G-38

Losses of Sheep and Lambs: Percent by Predator  
Within Each Agricultural Statistics District, Wyoming 1994 1/

Cause of Loss	Agricultural Statistics District					State
	North West	North East	West	South Central	South East	
	Percent					
Coyotes	72.4	68.6	70.4	76.8	69.9	71.9
Bobcats	—	0.8	—	1.1	0.4	0.6
Dogs	2.7	0.2	0.4	0.9	1.1	0.8
Bears	1.3	0.8	11.0	2.5	—	2.7
Eagles	8.9	12.2	6.7	11.6	17.3	11.6
Fox	9.8	13.6	9.2	4.6	9.8	9.4
Mountain Lions	4.0	2.0	1.9	2.3	0.4	2.1
Other Predators	0.9	1.8	0.4	0.2	1.1	0.9
Total Predators	100.0	100.0	100.0	100.0	100.0	100.0

1/ Includes all lambs losses both before and after docking.

Losses of Sheep and Lambs: Percent by Agricultural Statistics District  
Within Each Predator, Wyoming 1994 1/

Cause of Loss	Agricultural Statistics District					State
	North West	North East	West	South Central	South East	
	Percent					
Coyotes	11.7	29.7	13.8	31.3	13.5	100.0
Bobcats	—	41.7	—	50.0	8.3	100.0
Dogs	37.5	6.2	6.2	31.3	18.8	100.0
Bears	5.8	9.6	57.7	26.9	—	100.0
Eagles	9.0	32.9	8.1	29.3	20.7	100.0
Fox	12.3	45.0	13.9	14.4	14.4	100.0
Mountain Lions	22.5	30.0	12.5	32.5	2.5	100.0
Other Predators	11.1	61.1	5.6	5.6	16.6	100.0
Total Predators	11.7	31.1	14.1	29.3	13.8	100.0

1/ Includes all lambs losses both before and after docking.

# Wyoming

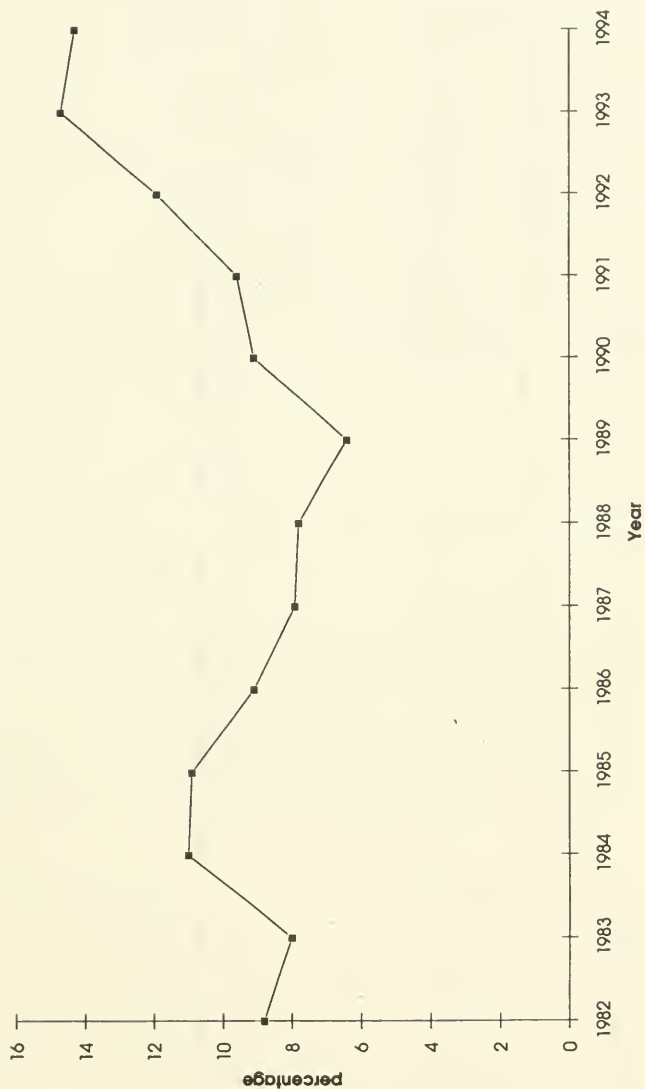
## Sheep and Lamb Predator Losses as a Percentage of Supplies

Year	Total S&L Pred Losses	Inventory Beg. of Year	Lamb crop	Total loss as % of Inv.		Total Lamb Pred. Losses	All Lambs Lost Before		Total Lambs Born (loss before docking + lamb crop	Lamb Losses as a % of Total Lambs
				+ Lamb Crop			Docking			
1982	77000	1130000	660000	4.3		62600	51500		711500	8.8
1983	71000	1060000	680000	4.1		59400	60600		740600	8
1984	86600	1090000	540000	5.3		72400	115300		655300	11
1985	82900	860000	610000	5.6		71700	47600		657600	10.9
1986	62600	819000	520000	4.7		50400	36400		556400	9.1
1987	51000	775000	515000	4		42900	29600		544600	7.9
1988	58600	875000	570000	4.1		47800	44200		614200	7.8
1989	47100	837000	550000	3.4		37300	34000		584000	6.4
1990	60900	805000	550000	4.5		54600	53300		603300	9.1
1991	60900	830000	570000	4.4		60000	52000		622000	9.6
1992	67900	870000	580000	4.7		76000	58000		638000	11.9
1993	97500	880000	530000	6.9		87000	62000		592000	14.7
1994	96000	810000	510000	7.3		81000	55000		565000	14.3

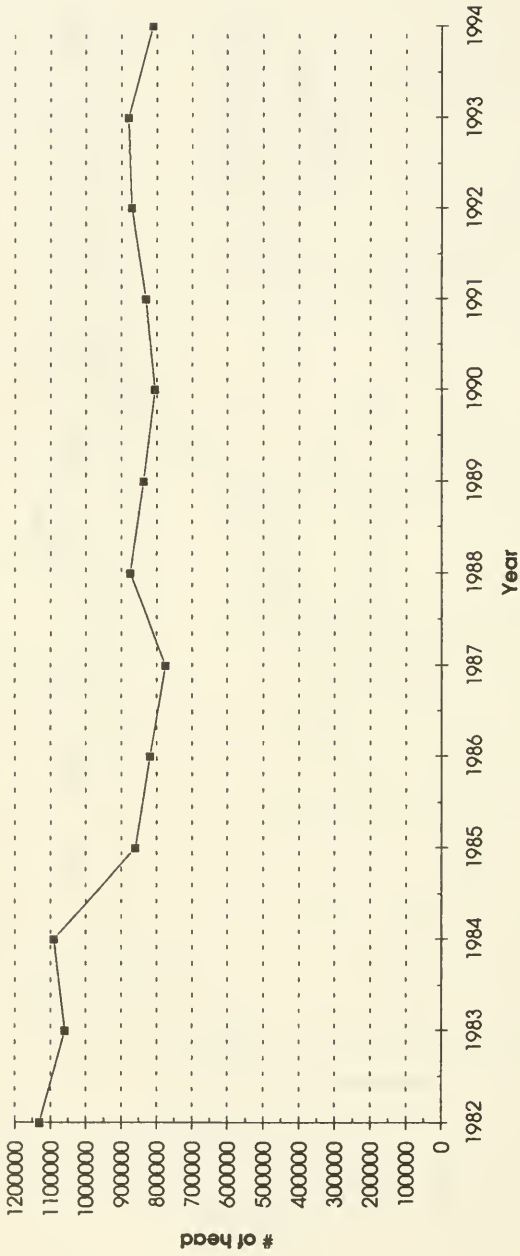
Wyoming Sheep &amp; Lamb Predator Losses: 1982-94



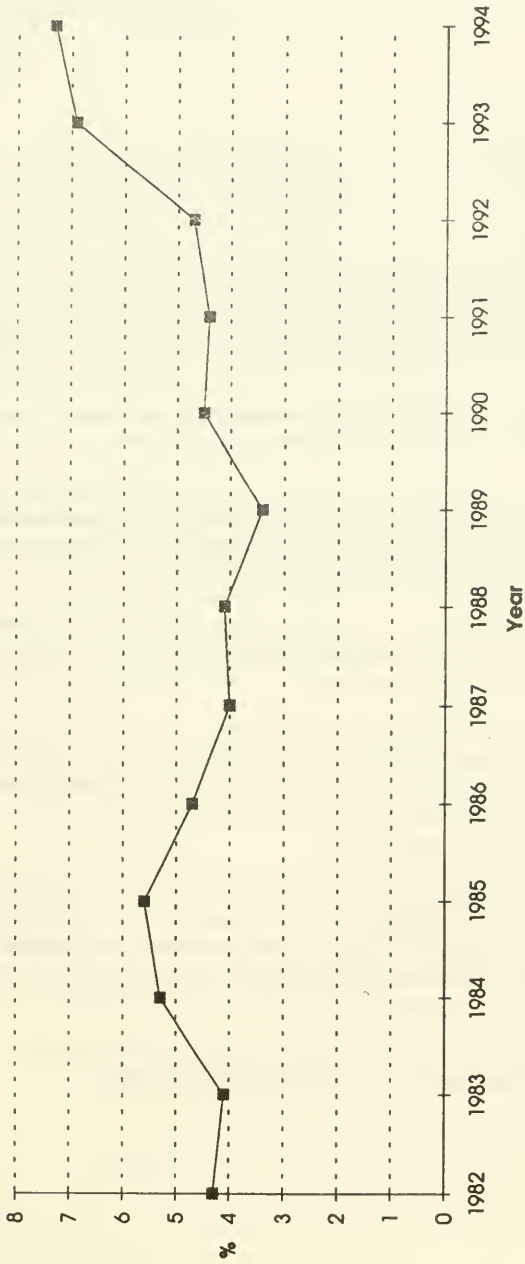
Wyoming Lamb Predator Losses: % of Total Lambs Born



Wyoming All Sheep and Lambs-Beginning of Year Inventory: 1982-94



Wyoming Total Sheep and Lamb Predator Loss-% of Inv. + Lamb Crop: 1982-94



July 12, 1995

U.S. House of Representatives  
Committee on Resources  
Washington, DC 20515

Dear Committee Members:

My name is Chas Kane, I manage a family corporation that is engaged in the business of raising beef cattle. My grandfather homesteaded about 15 miles west of here at the foot of the Big Horn mountains in 1880 and the Kane family has been here since that time.

Our ranch, and nearly all the ranches along the mountains are dependent on forest permits for approximately 4 months forage for a given number of cattle.

The permits are 10 year term permits. There are certain requirements you must meet to hold a permit. You must own 100% of the cattle on the permit, you must own enough property to feed the cattle for 4 months, you must pay the annual grazing fees before entering the permit - to name a few of the requirements.

At the present time our grazing fee is set by a formula calculated by the Secretaries of Agriculture and Interior. When the Livestock Grazing Act becomes law, a formula will be set by statute which will be much more reliable.

Our now-fee costs have risen constantly for the last several years. These are the costs that are having a devastating effect on permittees. The Forest Service, in addition to requiring us to bear one-half the expense of construction of range improvements such as fences and water developments, requires us to bear 100% of the cost of maintenance. We also have to furnish all material for maintenance.

Beginning this 1995 grazing season, the Forest Service is requiring the permittees to do their own monitoring of forage utilization. These practices will require setting up transects, measuring residual stubble height, establishing photo points, and recording the data etc. We have no assurance that any of the data collected will be accepted. All of these regulations are very time consuming and costly.

While this may not be considered a "takings," it definitely has impact on the management of the home ranch and the bottom line of the balance sheet.

U.S. House of Representatives  
June 12, 1995  
Page 2

When we talk about private property rights, it is my feeling the Federal government is intruding on the rights of the citizens of Wyoming and the State of Wyoming. The Equal Footing Doctrine declares all states will be admitted to the union equal. With the federal government holding 49% of land in Wyoming, we are hardly equal with the eastern states which have very little if any federal land within their boundaries.

On a much smaller scale, the Forest Service decided to shorten the length of several permits on the Big Horn Forest for the Summer of 1995. Some of the permits were shortened by as much as 3 weeks. This decision was made without any scientific data to justify such action. While this action is for the current Summer of 1995, I fear that this could become an annual action and thereby a permanent "takings" of a portion of the permit.

We have cow camps that are essential to the management of the resource and the livestock. The permittees built and maintain these camps. In recent years the Forest Service has claimed ownership of these camps. I believe, because we as permittees have built and maintained these camps, we should own them. If in fact the Forest Service does own them, I would consider this a "takings."

Thank you for the opportunity to address this committee and I would be happy to answer questions at a later time.

Sincerely,

Chas Kane  
1317 Stonegate Dr.  
Sheridan, WY 82801  
Phone: 307-672-3695

## STATEMENT OF MARK GORDON

Mr. Chairman, Ms. Cubin, and Members of the Task Force on Property Rights,

My name is Mark Gordon. I am a rancher and property owner from Buffalo, Wyoming. I grew up on a ranch in Kaycee, a little town south of here. While there, I served as a District Supervisor for the Soil Conservation Service, and in other civic capacities. I have two children in grade school, and a mortgage I would love to pay off as quickly as possible. Please let me make it clear these comments are my own and do not represent anyone else nor any other organization.

I must apologize, up front, at the unpolished nature of these comments. It is haying season and the weather has not been very cooperative. I sure wish you folks would consult with us when you set up the year's weather.

Your invitation to serve on this panel seemed to ask two things: One, that I impart my experiences with the Endangered Species Act, Wetlands Legislation, and/or any other Federal Land Management Agency; and by implication that I address in general the topic of private property. Is that correct?

My experience with Federal Land Management agencies goes back some time. My family's ranch in Kaycee has several acres of Bureau of Land Management Land. These parcels are mostly intermingled with private lands, and in some cases with state land. My first real introduction to the Bureau came when a Primitive Area designation was proposed for a tract of BLM land my father abutted and ran on. As a fourteen year old, I remember being amazed by the inconsistencies of logic and common sense the Federal Government seemed to display. There was a degree of arrogance too, which made plotting the best course difficult. The major theme, then, seemed to be the advancement of recreational use over all others but without good reason. Still the concepts discussed were sound. And ranchers neighboring this particular parcel were interested in exploring the possibilities. We listened.

Later after the discussions on that issue had polarized a bit (because the BLM was trying to please too many people), a beneficial resolution could no longer be found and I had my first introduction to politics by polemic. How frustrating it was to see the issues buried under layers of accusations and counter accusations. As a result, the status quo was maintained, which has been OK, but leaves unresolved some of the concerns ranchers had hoped might have been addressed. This unfortunate outcome further leaves the disposition of that land up for grabs, an uncertainty about which to this day I feel uncomfortable. There are and will always be increasing pressure on the Public Lands. You are the only people capable of allaying the concerns that arise from the competition of differing user groups.

Attitudes cultivated in those years continue. Because of the bad taste people still have from their earlier experiences, reasoned discussions are now almost impossible to have. Now ranchers consider any variation from the status quo suspect, and a beneficial future unattainable.

I partner on a ranch east of Kaycee where we also have Bureau of Land Management lands. Many of the personnel have changed at the Bureau, and with that the personality of the agency has changed. There has been a greater emphasis on working with the land owner. Although I cannot say we always agree, I can say with some confidence that we have a good working relationship with the Bureau. We have cooperated with them in some endeavors and they have been cooperative with us.

Finally, my own ranch has a few isolated parcels of Bureau of land Management lands. A few years ago I wanted to build a fence across some of that land, from one parcel of private property I held to another. Frankly I could not believe how the Bureau acted in this circumstance. I had seen the Bureau operate, as I said, for several years, and had read all the stuff about how obnoxious the Bureau could be. So I expected it would take some time to clear all the bureaucratic hurdles.

I called the range conservationist and explained what I wanted to do. He asked that I come down and indicate on a map where the fence would go. I did.

Next he asked for the fence line be marked so an archeologist could look the fence over. Oh Boy, some egg-head paper-pusher approving a fence I wanted to build which was located mostly on my own land. Have you heard this one?

Well, I complied and figured that would be the last I would see of them for a few months, or at least until the snow flew, making it impossible to build the fence.

A couple of days later, the range conservationist asked if he could bring the archeologist out to walk the fence. "Sure, come on. I'll take you", I replied.

The upshot was that the archeologist came and looked over the proposed fenceline, said it was O.K., and by that afternoon I had permission to build the fence. Not only that, but in the process I learned some archeology, and about an eagle trap Native Americans had used to get tail-feathers.

All in all it was a good experience and indicated a better working relationship than is usually reported these days. That attitude is generally what I have seen with the Bureau. Each year when I renew my permit, I have been pleased with the BLM's enthusiasm and flexibility to accommodate our somewhat controversial grazing practices. I cannot remember any noted difficulty other than I had

requested help in monitoring our range, which they declined owing to budgetary constraints.

Of course all of this is not as good as I would like. I sure wish I owned the BLM land, sure wish I had better summer pasture too. But that would cost plenty and I still have that nagging mortgage to pay down before I can be too ambitious.

I grew up knowing there were plots of state and BLM land in certain pastures we had. But we were proud of the condition of our range -- and the fact we treated it all the same. I think most ranchers do the same -- more so now than perhaps they did.

This concept is important because it goes to a question of interpretation, where I may clearly be out of synch with some other more bellicose public land permittees. I grew up believing that what I did not own was not mine. Even though I pay for grazing, I cannot bring myself to consider that practice differently than for the private leases I have used in the past. Consequently, although I am often frustrated by circumstances of leasing public ground, I have also been frustrated with the negotiations I have had with other private property holders.

There are a different set of pulls on public land. I understand that and lease willingly and knowledgeably of that circumstance. At times, it is difficult to lease land others view abstractly. Whether it be interested public organizations, or range scientists; typically neither group has long-term familiarity with the resource to back up claims often summarily made, and often their view is a snapshot which they compare with some phantom historic norm. As a result it often seems we are dealing with fickle public opinion more than the best interests of the land in question.

Does that mean environmental and cultural issues should be ignored, or that the public's lands should be transferred out of its hands? I think not. While I strongly support the rights private property holders, I also advocate public property. Because my family relies upon the Public lands, I care how the parks are maintained, how the Big Horn National Forest is administered, and how the roads are cared for. In our area, in fact, these amenities are valuable additions to our private properties, as the recent local real estate boom can underscore.

I really don't know if my experience with the BLM is typical. It has all been in the Buffalo Resource Area. I am aware there are other ranchers who have not had amicable a relationship. Without specific circumstances, however, it would be hard for me to judge just how awry regulation was, or to justify that judgment because someone didn't get along with an agency.

In our area BLM Permits are often intermingled with private lands and State Lands. Therefore, the issue of who controls what arises. In my opinion, that issue

cannot be resolved unless a spirit of cooperation is engendered, the BLM abrogates its responsibility for stewardship to the citizen's of the United States, or land ownership changes so that the BLM swaps lands to block its own holdings up. None of these is an easy course. Other potential solutions would be quite expensive.

Cooperation does not seem to me to be out of the realm of possibility. Despite some rather silly mathematical theories to the contrary, the Stock Drive I am familiar with (which is administered by the BLM) is in better shape today than it has been. That is a credit to the ranchers who use it, the agency which administers it, and the spirit of cooperation. Given the right sort of flexibility, the right sort of teeth, and a mandate to work together, many good things could be accomplished. Unfortunately in this day it seems far more important to hurl invective than to seek compromise. By always finding the bad, we often miss the good.

Serving as a District Supervisor for the Soil Conservation District in Southern Johnson County, I came to realize how convoluted and difficult the implementation of some of Congress's best ideas can be. We did our best, though. As a result of that experience I have never really balked at filing a crop or sodbuster report. It has been a relatively painless process and the Farm Services personnel I have dealt with have been courteous and helpful. I must admit I never tried anything too ambitious like drain a swamp, because I was brought up to consider swamps as a good buffer against flooding and not simply more cropland or a potential mall.

There are difficulties that arrive when the public interest collides with private property, which is the impetus of these hearings and your task force I believe. One aspect of that discussion is that private property is private and no one, by God, should tell the private property holder what to do.

The other is engendered in the sense of community in which we all must live. "No man is an island entire of itself; every man is a piece of the Continent, a part of the main..." as John Donne has said. When a neighbor brings hay onto his land with leafy spurge in it, and the seeds float down the irrigation ditch onto my otherwise clean hay meadow he spoils my land. When a plant upstream from my ranch dumps toxic waste into the stream running through my land, it affects my property. Just as my neighbor's property value would be affected if I were indiscriminate with herbicides or sterilants and allowed them to wash down on him.

We live with one another and depend on each other to be good citizens. Thomas Jefferson expressed a similar sentiment, "The earth is given as a common stock for man to labor and live on...." Because not everyone is as scrupulous as we would hope, we create laws which should, ideally, protect things we most care

about and upon which we should have some commonality of focus: clean water to drink, clean air to breathe, a fair business climate in which to prosper, good schools, a strong defense, and so on. James Madison pointed out in the *Federalist Papers*, "What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." But we are not all angels.

Thus the notion of "public good" is established. That concept extends to the schools, museums, land and so on we all enjoy publicly. Thus we have public property, which I believe we must also enact laws to protect.

A crucial question of balance arises when these two collide. That is why I applaud you as a Congress for reviewing these issues. Clearly as property owners, we should be given reasonable opportunity, but as the years of the dust bowl indicated, wisdom is not guaranteed by individual liberty. There is a right and reasonable role for government to enact laws governing our enterprises. It was foreseen by our founding fathers. The course of the environmental legislation you have asked for testimony on is a reflection of that understanding. You have sought to define that role. But I offer Thomas Jefferson's Caveat "Great innovations should not be forced on slender majorities."

That brings me to the issue of business opportunity. To me it makes far greater sense to have regulatory levels with year-to-year consistency; than it does to have the sort of wild swings we have seen over the past few years. If I can be assured of a level and fair regulatory platform on which all of my peers must compete, and I can be certain of what that platform will be, I am happy. I can budget for the expected, uncertainty can ruin me.

I admire our country for the leadership in environmental policy it has shown. One need only look to the former Soviet Union to understand how not to run a country: economically, politically, and environmentally it was the converse of our great nation. Look at the mess its former members now find themselves in.

The vision of leadership must constantly be tested. The good you have accomplished by asserting the rights of property owner's over the public good is that you will force regulation to be more responsive to the circumstances of a situation; rather than seeking some universal construct on which to base action. For too long now we have sought to prescribe good. House Bill 9 tries to throw all of that attitude back and affirm property "rights" and local government.

There is a weakness in that approach of which you are no doubt aware. That is the specter of the local bully: The individual or business who by virtue of its economic worth or standing within local government can make things happen to bypass the best intentions of local government. Examples might be a developer who forces a variance from community zoning, a ne'er-do-well corporation who refuses to clean up its act and thus continues to pollute. In such circumstances it is helpful for common citizen's to have the leverage the Federal Government can provide. But that leverage should be in the form of common performance standards, equal among states, and upon which there is general agreement.

Current wisdom seems to dispute the role citizen's should have in charting the course of their community. I am not sure you do. It seems the issue you address today is when should compensation be triggered. That is a tough question that works its way back to the issue of balance. One the courts were designed to address.

If one were inclined to jump on the Private Property Band Wagon one might thump his tub and say any regulation affecting property would constitute a taking and should be compensated. On the other hand, as a responsible citizen and taxpayer I would not like to reward the speculator or the bad actor by paying them to stop doing what better citizen's are not doing already. HR 9 seems to suffer from the same myopic let's assure we have bad actors that so much of our Federal Legislation suffers from. It rewards those who fly in the face of long considered public good, rather than those who are already complying. It could encourage speculation on a massive scale. Indeed this bill might be considered real estate speculator's insurance.

As a property owner and rancher, each year I dread one season -- hunting. I can honestly say the majority of hunters are wonderful people who act responsibly and with respect for my land and property. It is the few bad experiences every rancher has to have each hunting season that seems to define the name of hunter as a surely, ill-mannered, galoomphing beast we wish would just go away. It's a case where the few bad examples set a tenor for the rest who have to work harder because of it. It's too bad we have to deal with it because it means some good people are turned away. My concern about the mechanism which HR 9 proposes is similar only instead of being turned away they will be remunerated. A few canny developers will be able to guarantee a return on their investment automatically, rather than to pursue compensation through the court system -- as has been the norm until now.

In closing, let me state how glad I am you are seeking the thoughtful comment of your nation's citizens. It is a bit unclear why after the issue of

"takings" has already been addressed by this Congress and your decision recorded -- but government often moves in mysterious ways. Still, and I say this with all my conviction, remember always balance as you further pursue this issue. And further, please, as a rancher, who hopes one day to pass his ranch on to his children (assuming that will still be possible), remember, as I do, the pendulum which changed Congress is a capricious one, which can just as quickly undo what you have done. I fear for when the zeal of today will be redressed by the anger of tomorrow, and as with the French Revolution all moderation goes out the window.

Respect the rights of the our nation's citizens in both our properties public and private. Thank you.

Testimony before:

Private Property Task Force  
Committee on Resources  
U. S. House of Representatives

Date: July 17, 1995

By: Dan Scott  
Padlock Ranch Company  
Dayton, Wyoming 82836

My primary concern, as a private property owner, is the damage done to a large number of local ranchers through Congressional Legislation in the form of the CROW BOUNDARY SETTLEMENT ACT OF 1994, Public Law 103-444, November 2, 1994.

This law was passed to rectify an error made in 1891 while surveying the eastern boundary of the Crow Reservation. The error caused a loss to the Crow Tribe of approximately 36,165 acres of land and minerals.

The law gave the Tribe relief in the form of;

- 1) relocating the boundary to the proper survey line for a part of the distance giving the Tribe an additional 11,300 acres within their reservation,
- 2) offering the Tribe 46,625 acres of land held by the State of Montana within the reservation, and
- 3) putting \$85,000,000 into a Trust Fund for the Crow Tribe and allowing them the use of the income.

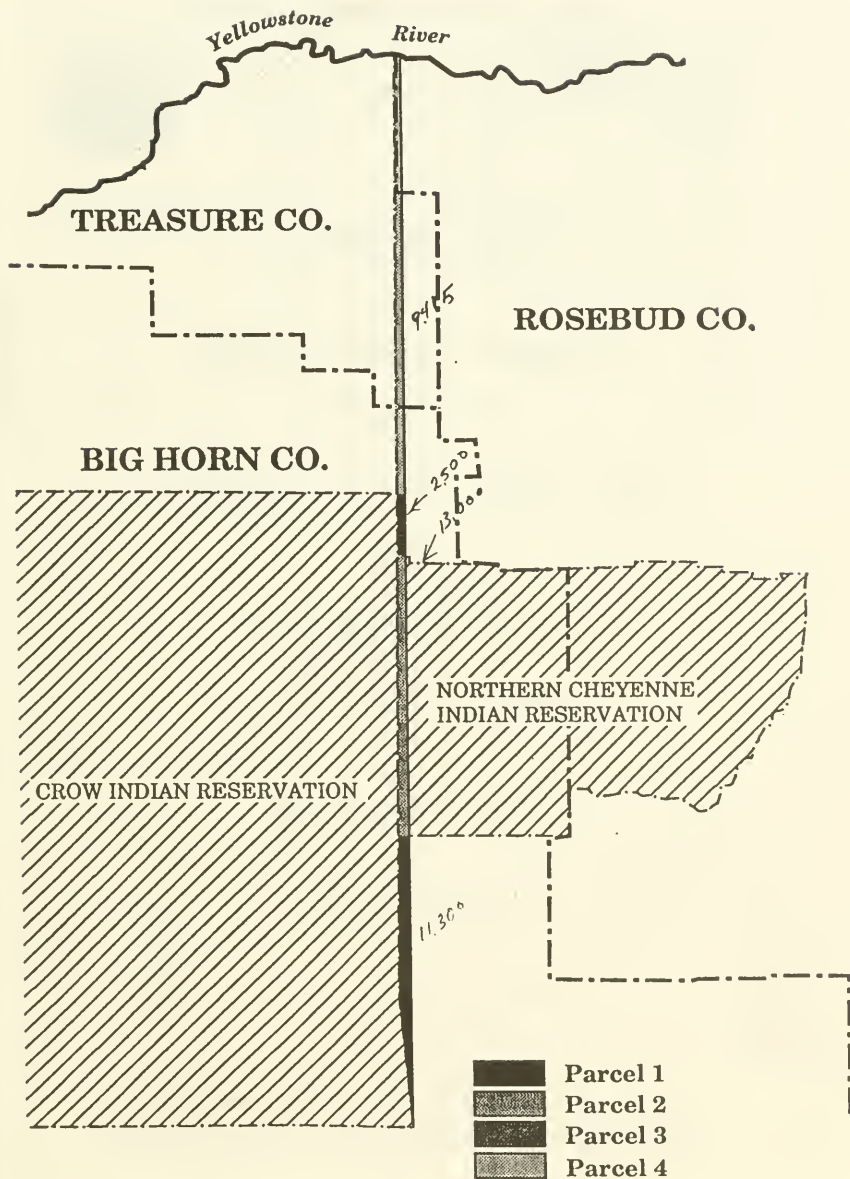
A modern survey confirmed that the original survey was off the line, as were many of the surveys of that time, but the error was by as much as three quarters of a mile. The Legislators chose to correct the error by moving part of the boundary (Parcel 1) to its proper location. This was quite a shock to fourteen ranch operators who suddenly realized that their property was now located within the Crow Reservation. For several of them, their homes and out-building suddenly were on the Reservation. Being on the reservation means that these individuals are now subject to Tribal Law and Order, Tribal hunting and fishing regulations, possible taxation by the Tribe, and a lowering of real estate values because of these and other problems. They can no longer call for the Sheriff in times of distress, but must call 150 miles away for the FBI or take their chances with the Tribal Police and be subject to their jurisdiction and courts.

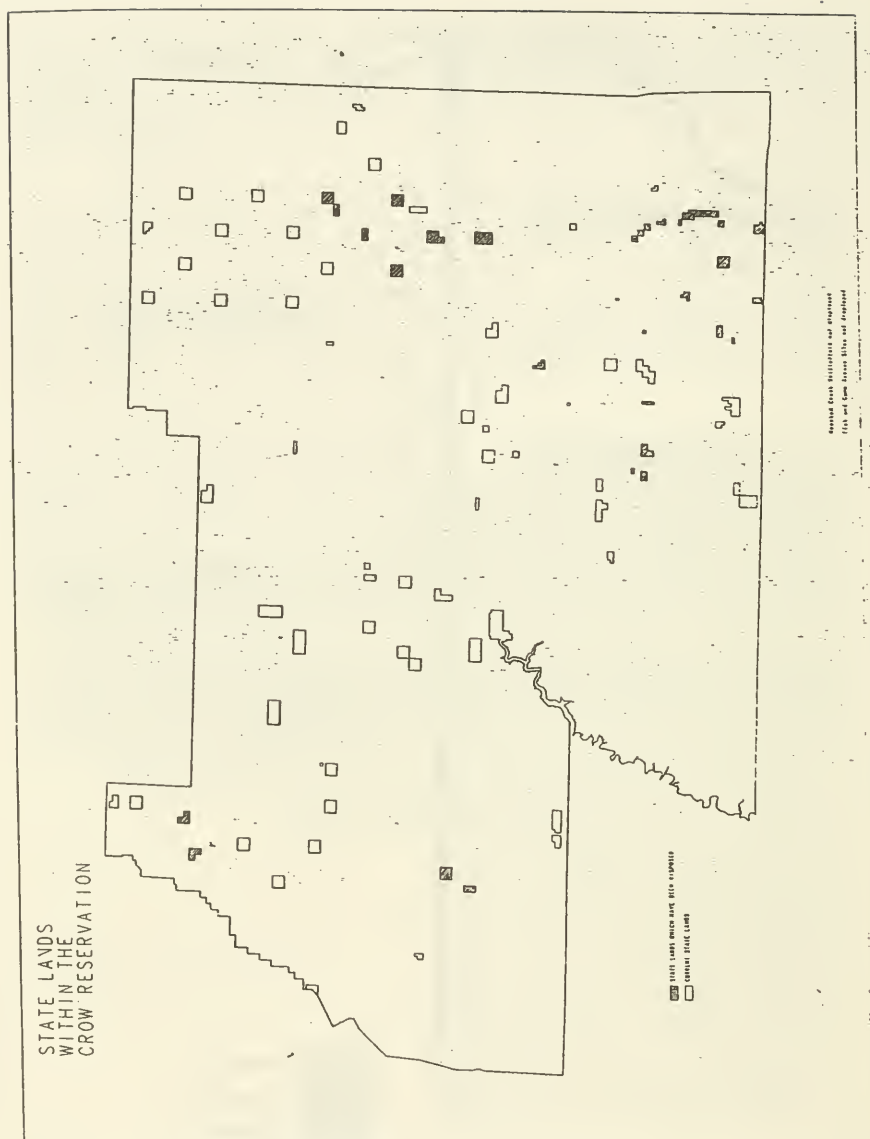
The Crow Settlement Act also encourages the State of Montana (OSL) and the Bureau of Land Management (BLM) to go through an exchange of lands where the OSL would acquire lands presently held in Eastern Montana by the BLM in exchange for lands currently held within the Crow Reservation. Upon acquiring those lands on the Reservation, the BLM would gift them to the Crow Tribe as part of the settlement.

This exchange affects both the holder of BLM leases which would become State Lands and the current lessee of the State Lands on the Reservation. The rental rates for State Lands are more than double those presently charged by the BLM and the use of State Lands is more liberal towards the public. The counties where the BLM lands are located receive fees in lieu of taxes from the Federal Government, but would not from the State. The lessees of the State Lands on the Reservation would be the greatest losers as they would lose their leased lands without any compensation and they would have a Tribal Member as a new neighbor inside the present boundaries of their ranch.

The Settlement Act has been described as being "revenue neutral" because it did not require any special funding by the Federal Government. The \$85,000,000 trust fund for the Tribe would come out of Federal mineral revenues from coal currently being mined off the Reservation. The lands given to the Tribe would not cost the Federal Government because they originate from exchanges. The truth is that the Government will be losing \$85,000,000 of mineral royalties and the BLM could very well spend twice the value of the exchanges, not counting the energy expended by the OSL, BLM, Crow Tribe and lessees.

The Crow Settlement Act of 1994 is a perfect example of Legislators in Washington attempting to right a wrong but creating more wrongs in the process. The Federal Government has solved their problem by passing it down to the private property owners for solution.







Michael Sierz, AICP

**American Planning Association**

before a hearing of the

**Task Force on Private Property Rights**

of the

**Committee on Resources**

**U.S. House of Representatives**

**Sheridan, Wyoming**

**July 17, 1995**

American Planning Association, 1776 Massachusetts Avenue, Suite 400  
Washington, DC 20036 Phone (202) 872-0611 Fax (202) 872-0643

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Mr. Chairman and members of the Private Property Rights Task Force on Resources. I am here today representing the American Planning Association. I am currently, and have been for 16 years, the planning director for Converse County, Wyoming. I am also the economic development coordinator for Converse County. My 20 years of professional planning experience include serving on several economic development groups. These include working with the county's small business incubator group that focuses on job creation. I also served on the Jackalope Economic Development Council that works on attracting businesses to the Converse County area. I have also worked as an environmental planner for the Montana Department of Resources and as City/County planning director for Sweetgrass County, Montana. I am the vice-chairman of a five county Resource Conservation and Development district. I am an active member of the American Planning Association serving as vice-chairman of the Wyoming Planning Association, and the Wyoming representative to the five State Western Central Chapter of the American Planning Association. I am also a member of the American Institute of Certified Planners.

I am testifying on behalf of the American Planning Association on the issue of "takings." I am testifying today against the concepts in H.R. 925, in which the House passed on March 3rd, and against the passage of other similar "takings" legislation. I respectfully request that the complete text of my statement be included in the official hearing record.

The American Planning Association is a national organization whose members include public and private city and regional planners, elected and appointed officials at all levels of government, educators, students and citizens interested in the future of our communities. We are not an organization which represents one point of view. We represent the efforts of local communities to envision and reach a future of their own choice.

**The American Planning Association supports private property rights.** The American Planning Association strongly opposes "takings" compensation and assessment bills because they would:

1. Increase bureaucracy and red tape at every level of government
2. Slow the development process and result in a decrease in jobs
3. Result in significant and unpredictable costs to the public treasury
4. Add to regulatory confusion at the state and local levels. State and federal laws are inextricably linked. "De-coupling" these laws would be a nightmare!
5. Result in a proliferation of federal, state, and local lawsuits.

Today, I want to express the Wyoming point of view on this subject. This part of the country is basically in its infancy in dealing with local (city/county) land use issues. I live in a State where the word zoning is not often used because it is unpalatable.

However, we have the same basic land use problems the rest of the country has. We are just beginning to recognize many of these problems. We now have people at the threshold of understanding planning and its many facets.

For example, in the last year, Converse County has been sued twice by a fireworks dealer declaring that his stand can be located anywhere in the county. He put up shop in a residential area. He claims our very simple development regulations are unconstitutional. The neighborhood resisted this development "big time" and through their efforts and the county, have obtained a temporary restraining order. The larger case is yet to be settled.

Converse County just completed a development permit process for a salvage yard near Douglas. Douglas and the Converse County citizens have made it clear they want a new land use plan that gives greater weight to aesthetics. Our planning efforts have started to achieve this goal as expressed by the citizens.

Here's another example of how planning can be used to protect private property and community values: In Sweetgrass County, Montana, there is a 200 square mile zoning district implemented by local ranchers to protect their ranching lifestyle. This district has now been in effect for 17 years. These folks came to the planner and stated they did not want "ticky-tacky development" all over the Crazy Mountains. We helped them develop a plan and zoning regulation that maintains the area for agriculture, recreation and forestry. This area included National Forest Lands within the zoning district boundaries. This example shows what very conservative people can do through their local government.

Local governments in our State are becoming serious about planning and implementation through establishment of regulations. This presents a real problem because H.R. 925 states that "local zoning will be exempted." Our fear is that when new regulations are passed, they may be considered "takings."

Although federal standards and safeguards are, for many Wyoming communities, a way to help protect their local cultural, historic and natural resources, local government can ill-afford to be hamstrung by new laws from Washington that preclude us from doing local planning. The decision to have or not to have planning and land use regulation should be left up to the local government. The side effects from the "takings" law could have the potential to remove the decision-making from the local government.

We feel that if there are problems with some of the major federal legislation on the books, (Clean Air Act, Endangered Species Act, Wetlands, etc.) please make the necessary changes to those particular laws. There is not need for additional burdens to taxpayers.

We have an old saying around these parts, "Don't fix it if it's not broken." I believe the recent court decisions on "takings," dealing with especially local government, firmly establishes that the land use system is not broken.

Thank you for this opportunity to testify. I would be willing to respond to your questions today or in writing.

\* \* \* \* \*

*APA is a non-profit professional, public interest and research organization representing more than 30,000 urban and rural planners, elected and appointed officials and citizens. Our members share a commitment to the use of sound planning to meet our nation's economic and community development needs, to conserve resources, and to preserve the environment.*

U.S. House of Representatives, 104th Congress  
 Committee on Resources  
 Task Force on Private Property Rights  
 Testimony of Andrea Knutson  
 Sheridan Area Resource Council  
 July 17, 1995

Thank you Congressman Shadegg and Task Force members for the opportunity to appear before you today. My name is Andrea Knutson and I am a wife, mother and working woman living in Sheridan County, Wyoming. I was born and raised here and I am speaking as a property owner who has had to comply with all federal, state and local laws. While I too have had some frustrations dealing with cumbersome regulations, for the most part I believe these regulations are there for the benefit of everyone.

One local zoning regulation protected my home and land by keeping a proposed racetrack from being built next door. But we had to fight to enforce the law. Had the race track been built our property would have been devalued and our lifestyle disrupted.

Because the developers weren't allowed to build the racetrack does this mean the government should have reimbursed them for estimated losses. Had they been allowed to build the racetrack, then would they then had to pay me for the loss of value to my property, tranquility and lifestyle?

Takings laws will be at the expense of you and I the American taxpayer. If someone wants to build an incinerator next to your home, but zoning won't allow it they could be eligible for a taking. On the other hand if they are allowed to build you could be eligible for taking. In every situation where an individual wishes to change the use of a piece of property, a takings could occur. A current takings suit in excess of \$40 million dollars is still pending against the State of Wyoming by Rissler and McMurray Company for what they perceive as delays in the permitting process on a state lease limestone quarry. Are leases truly private property? Or do they belong to the public? I know when I lease my private property it is my property and the terms of the lease are dictated by me, the owner.

The 5th amendment to the U.S. Constitution states that private property shall not be taken for public use without just compensation. What actually constitutes a "taking" of private property is now the subject of a lot of political debate, both at the local and national level.

In 1982, Supreme Court Justice Scalia defined a regulatory taking like this, "Where regulation denies all economically beneficial or productive use of land. A total deprivation of beneficial use."

To me, this means if a private property owner cannot find any use for the his or her property due to regulations, then he or she may be entitled to a takings claim and compensation. However, just because a property owner can't build a factory on top of a wetland or in the middle of a subdivision doesn't mean he can't derive a reasonable profit from that land.

But somehow this isn't good enough for big industries pushing takings legislation. Along with tax breaks and subsidies, they want yet another handout from Uncle Sam when ANY regulation results in a so called "taking" of ANY small degree on even a small portion of their land.

For instance, if someone were denied being able to build a casino they would be able to demand payment for estimated future profits. Where would money to pay these landowners come from.

This means zoning laws that keep any enterprise from being built, like a nightclub or an incinerator from being located next to your child's school, could now be defined as a taking. Safety regulations in the workplace, health regulations in restaurants and food processing, could also be defined as a "takings". And we, the taxpayer, would have to pay industry because we implemented regulations for the benefit, the health and safety, of the many, rather than the few.

We don't hear advocates of Takings laws, and private property rights, talking about the times government regulations maintain and increase their property values with roads, water and sewer systems, and fire and police protection. Does this mean that any benefit derived from government investments should be reimbursed to the taxpayer? We don't hearing takings proponents talking about tax breaks, blocks imports, incentive programs or other subsidies. Do these programs constitute a takings from the American taxpayer?

Who is going to pay for the increased bureaucracy takings laws will create? The law will require more bureaucrats and red tape and that is the last thing we need. Takings laws will cost local, state and federal government billions in tax dollars.

Private property rights have been protected for over 200 years by the Constitution and the Courts. Each case is different and what constitutes a taking is not a simple black and white situation. It cannot be resolved by a one size fits all law that robs the taxpayer and leaves the public in danger. We must look for a solution that keeps our Constitution in tact and helps private property owners resolves disputes through adjudication or some other process not by wiping out our health and safety protections and bankrupting the taxpayer.

Finally, I believe this whole hearing has been an orchestrated, lopsided event designed to drum up support for the takings legislation that is stalled in the Senate. If you were truly interested in hearing from the people of Wyoming regarding this issue an open mike would have been more appropriate.

U.S. House of Representatives, 104th Congress  
Committee on Resources  
Task Force on Private Property Rights  
Testimony of John Boyer  
July 17, 1995

Thank you Mr. Chairman and members of the committee for the opportunity to submit testimony and appear before you today. My name is John Boyer and I am here as a private property owner.

I live in Carbon County down in the South Central part of the state near a town called Savery. I am a rancher and also operate the Antelope Retreat Center on our ranch. I am particularly interested in issues related to water and public lands in Wyoming. It is a pleasure to be here and testify concerning the whole range of subjects that are related to private property rights or more appropriately the issue called takings.

Strong environmental laws have helped to protect my private property and the property of others. The takings provisions you passed in H.R. 9 endanger these protections and hurt property owners. In addition, these provisions are budget busters for the taxpayer.

The family ranch I own and operate sits along Savery Creek and is threatened with the development of a dam. This proposed dam, Sandstone dam, would flood my ranch and destroy our livelihood as well as critical habitat for elk and other wildlife.

The Army Corps of Engineers and the regulations under their jurisdiction have been critical and instrumental ensuring a thorough review of this proposal and in helping me to protect this ranch, my property and my business which depends on this land. Without these regulations my property would have already been destroyed, drowned under several feet of water.

In my fight to protect my property I have become very familiar with federal regulations. These regulations have been the only way that we have been assured that a thorough assessment of all the factors related to the dam's construction are fully investigated and assessed. Without these regulations we would be sunk.

Though I grew up on a sheep ranch in Savery I spent about 20 years of my adult life working as an analyst and scientist in several parts of the country. I was involved in the 70's in a legislative effort in Colorado to write guidelines and regulations for sanitation systems of individual homes along the front range. I worked on the original effluent guideline studies for EPA which helped define and quantify the discharges for non-fuels and non-metal industries, I worked on a project related to patents on bentonite claims for the BLM, helped do a cost

benefit analysis for President Ford on proposed regulations for OSHA and also helped on several studies for the EPA to assess the problems related to toxic substance disposal from certain minerals processing and manufacturing industries. These activities have familiarized me with why and how regulations are created.

While I strongly support private property rights. I also support the obligation of the government to protect the public and their interests. An individual's right to do whatever he wants with his property ends when his actions negatively impact his neighbors' property or their health and well-being.

While I respect your efforts to protect private property rights and make things easier for the average person, I am very concerned that the takings legislation that passed the House will have the opposite effect. In fact, the main beneficiaries of H.R. 9 will not be average Americans at all, but large corporations.

I've been involved to some extent in the Wyoming legislature to help defeat takings legislation for the last three years. And the legislation itself and the words that are in the various proposed bills are only the public representation of what is happening. There is a lot more stuff behind this.

Basically, I think that takings legislation is driven by greed. It is very Machiavellian. Its real intent is to roll back regulations and guidelines and to prevent new regulations and guidelines. It reflects a dislike and disrespect for how and why all sorts of health, safety and environmental regulations have evolved.

This takings, or so called private property rights legislation is very mean spirited and is proposed by the most powerful and vested interests in the state and across the country. It is not the little guy who will profit from takings legislation. In fact, the little guy is the one who is most prone to get hurt by the weakening of health and safety guidelines.

Earlier I used the word Machiavellian, let me explain that. This year I tried to testify at the Wyoming House Agriculture hearing. I'm sure Rep. Pasaneaux who is here today remembers that day. I wasn't able to testify, but what I was going to say was that as an opponent of the Sandstone dam I hoped Rep. Pasaneaux's whole original takings legislation would pass so that the my property and business losses and those of my relatives projected for the life of the project would be reimbursed by the state of Wyoming.

I had estimated that loss to be close to a million dollars. If Rep. Pasaneaux's version had passed that might have been possible for me, a million dollars. How Machiavellian is that. Although the Sandstone project is not a justified or plausible project, can you imagine what sort of cost it would be for the state of Wyoming if every owner of condemned property for a water project could claim a takings.

I use this example tongue in cheek but in relation to the tone of what conservatives are yelling and screaming about recently I don't find it far fetched. You know, here in Wyoming the last thing we need is to give a little more power and control to powerful vested interests in the state.

This country is a progressive nation when it comes to health, safety and environmental controls. We have spent over a hundred years getting to where we are. We have vastly improved our air quality, we have improved our water quality in both our estuary and streams. But we still have long way to go even as our human numbers and stresses on all aspects of our human environment increase. We should not be turning back the clock. Rather we should be clearly defining the next tier of guidelines and rules to ensure the planet's health and well being.

We are a model for the world and the world looks to us for guidance. We need to stay at bat and remain the leaders. Takings legislation of any kind is a step backwards. We are already protected by the 5th amendment and everybody here in this room knows that.

Let me tell you something I heard on the radio a couple of days ago. A woman whose child nearly died from E coli poisoning in the Northwest has formed an organization to get the next tier of rules passed for meat inspections. Her statistics indicate that over 500 people a year die from one of four types of bacterial or viral infections related to meat processing. Over 2 million people get violently ill and often severely affected for the rest of their life as this woman's son has.

The point is, in Washington D.C. right now the leading Republican candidate for president is attempting to undermine the implementation of new meat testing guidelines for poultry and red meat processing. These regulations have already been implemented in Europe.

What is this nasty mood about? What is takings legislation about? I think it is mainly about greed and selfishness. I should point out that industry and entrepreneurs have never been in the forefront of their own regulations when it comes to health and safety guidelines. They often, but not always cooperate when pushed. Takings legislation won't help industry monitor and control themselves. It will force the taxpayer to pay them not too.

This bill will break the federal budget and degrade the strong federal standards that protect private property owners and the public. I urge you to reconsider your views on the takings legislation you passed. I urge you not to destroy the future productivity of our lands and water or sell out the future of our children in the name of greed and self interest masquerading as private property rights.

104TH CONGRESS  
1ST SESSION

# H. R. 925

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IN THE SENATE OF THE UNITED STATES

MARCH 7 (legislative day, MARCH 6), 1995

Received; read twice and referred to the Committee on Environment and  
Public Works

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## AN ACT

To compensate owners of private property for the effect  
of certain regulatory restrictions.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Private Property Pro-  
5       tection Act of 1995”.

1 **SEC. 2. FEDERAL POLICY AND DIRECTION.**

2 (a) **GENERAL POLICY.**—It is the policy of the Federal  
3 Government that no law or agency action should limit the  
4 use of privately owned property so as to diminish its value.

5 (b) **APPLICATION TO FEDERAL AGENCY ACTION.**—  
6 Each Federal agency, officer, and employee should exer-  
7 cise Federal authority to ensure that agency action will  
8 not limit the use of privately owned property so as to di-  
9 minish its value.

10 **SEC. 3. RIGHT TO COMPENSATION.**

11 (a) **IN GENERAL.**—The Federal Government shall  
12 compensate an owner of property whose use of any portion  
13 of that property has been limited by an agency action,  
14 under a specified regulatory law, that diminishes the fair  
15 market value of that portion by 20 percent or more. The  
16 amount of the compensation shall equal the diminution in  
17 value that resulted from the agency action. If the diminu-  
18 tion in value of a portion of that property is greater than  
19 50 percent, at the option of the owner, the Federal Gov-  
20 ernment shall buy that portion of the property for its fair  
21 market value.

22 (b) **DURATION OF LIMITATION ON USE.**—Property  
23 with respect to which compensation has been paid under  
24 this Act shall not thereafter be used contrary to the limita-  
25 tion imposed by the agency action, even if that action is  
26 later rescinded or otherwise vitiated. However, if that ac-

tion is later rescinded or otherwise vitiated, and the owner elects to refund the amount of the compensation, adjusted for inflation, to the Treasury of the United States, the property may be so used.

**SEC. 4. EFFECT OF STATE LAW.**

If a use is a nuisance as defined by the law of a State or is already prohibited under a local zoning ordinance, no compensation shall be made under this Act with respect to a limitation on that use.

**SEC. 5. EXCEPTIONS.**

(a) PREVENTION OF HAZARD TO HEALTH OR SAFETY OR DAMAGE TO SPECIFIC PROPERTY.—No compensation shall be made under this Act with respect to an agency action the primary purpose of which is to prevent an identifiable—

(1) hazard to public health or safety; or

(2) damage to specific property other than the property whose use is limited.

(b) NAVIGATION SERVITUDE.—No compensation shall be made under this Act with respect to an agency action pursuant to the Federal navigation servitude, as defined by the courts of the United States, except to the extent such servitude is interpreted to apply to wetlands.

1   **SEC. 6. PROCEDURE.**

2       (a) REQUEST OF OWNER.—An owner seeking com-  
3   pensation under this Act shall make a written request for  
4   compensation to the agency whose agency action resulted  
5   in the limitation. No such request may be made later than  
6   180 days after the owner receives actual notice of that  
7   agency action.

8       (b) NEGOTIATIONS.—The agency may bargain with  
9   that owner to establish the amount of the compensation.  
10  If the agency and the owner agree to such an amount,  
11  the agency shall promptly pay the owner the amount  
12  agreed upon.

13      (c) CHOICE OF REMEDIES.—If, not later than 180  
14  days after the written request is made, the parties do not  
15  come to an agreement as to the right to and amount of  
16  compensation, the owner may choose to take the matter  
17  to binding arbitration or seek compensation in a civil ac-  
18  tion.

19      (d) ARBITRATION.—The procedures that govern the  
20  arbitration shall, as nearly as practicable, be those estab-  
21  lished under title 9, United States Code, for arbitration  
22  proceedings to which that title applies. An award made  
23  in such arbitration shall include a reasonable attorney's  
24  fee and other arbitration costs (including appraisal fees).  
25  The agency shall promptly pay any award made to the  
26  owner.

1 (e) CIVIL ACTION.—An owner who does not choose  
2 arbitration, or who does not receive prompt payment when  
3 required by this section, may obtain appropriate relief in  
4 a civil action against the agency. An owner who prevails  
5 in a civil action under this section shall be entitled to, and  
6 the agency shall be liable for, a reasonable attorney's fee  
7 and other litigation costs (including appraisal fees). The  
8 court shall award interest on the amount of any compensa-  
9 tion from the time of the limitation.

10 (f) SOURCE OF PAYMENTS.—Any payment made  
11 under this section to an owner, and any judgment obtained  
12 by an owner in a civil action under this section shall, not-  
13 withstanding any other provision of law, be made from the  
14 annual appropriation of the agency whose action occa-  
15 sioned the payment or judgment. If the agency action re-  
16 sulted from a requirement imposed by another agency,  
17 then the agency making the payment or satisfying the  
18 judgment may seek partial or complete reimbursement  
19 from the appropriated funds of the other agency. For this  
20 purpose the head of the agency concerned may transfer  
21 or reprogram any appropriated funds available to the  
22 agency. If insufficient funds exist for the payment or to  
23 satisfy the judgment, it shall be the duty of the head of  
24 the agency to seek the appropriation of such funds for the  
25 next fiscal year.

1 **SEC. 7. LIMITATION.**

2       Notwithstanding any other provision of law, any obli-  
3 gation of the United States to make any payment under  
4 this Act shall be subject to the availability of appropria-  
5 tions.

6 **SEC. 8. DUTY OF NOTICE TO OWNERS.**

7       Whenever an agency takes an agency action limiting  
8 the use of private property, the agency shall give appro-  
9 priate notice to the owners of that property directly af-  
10 fected explaining their rights under this Act and the proce-  
11 dures for obtaining any compensation that may be due to  
12 them under this Act.

13 **SEC. 9. RULES OF CONSTRUCTION.**

14       (a) **EFFECT ON CONSTITUTIONAL RIGHT TO COM-**  
15 **PENSATION.**—Nothing in this Act shall be construed to  
16 limit any right to compensation that exists under the Con-  
17 stitution or under other laws of the United States.

18       (b) **EFFECT OF PAYMENT.**—Payment of compensa-  
19 tion under this Act (other than when the property is  
20 bought by the Federal Government at the option of the  
21 owner) shall not confer any rights on the Federal Govern-  
22 ment other than the limitation on use resulting from the  
23 agency action.

24 **SEC. 10. DEFINITIONS.**

25       For the purposes of this Act—

1           (1) the term "property" means land and in-  
2           cludes the right to use or receive water;

3           (2) a use of property is limited by an agency  
4           action if a particular legal right to use that property  
5           no longer exists because of the action;

6           (3) the term "agency action" has the meaning  
7           given that term in section 551 of title 5, United  
8           States Code, but also includes the making of a grant  
9           to a public authority conditioned upon an action by  
10          the recipient that would constitute a limitation if  
11          done directly by the agency;

12          (4) the term "agency" has the meaning given  
13          that term in section 551 of title 5, United States  
14          Code;

15          (5) the term "specified regulatory law"  
16          means—

17                (A) section 404 of the Federal Water Pol-  
18                lution Control Act (33 U.S.C. 1344);

19                (B) the Endangered Species Act of 1979  
20                (16 U.S.C. 1531 et seq.);

21                (C) title XII of the Food Security Act of  
22                1985 (16 U.S.C. 3801 et seq.); or

23                (D) with respect to an owner's right to use  
24                or receive water only—

(i) the Act of June 17, 1902, and all Acts amendatory thereof or supplementary thereto, popularly called the "Reclamation Acts" (43 U.S.C. 371 et seq.);

(ii) the Federal Land Policy Management Act (43 U.S.C. 1701 et seq.); or

(iii) section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604);

(6) the term "fair market value" means the most probable price at which property would change hands, in a competitive and open market under all conditions requisite to a fair sale, between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, at the time the agency action occurs;

(7) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States; and

(8) the term "law of the State" includes the law of a political subdivision of a State.

Passed the House of Representatives March 3, 1995.

Attest:

ROBIN H. CARLE,

*Clerk.*

July 17, 1995

Representative Cubin and Committee:

I feel the government is illegally taking the rancher's and state's land to give to the Crow Indians. Why doesn't the statute of limitations apply to all people equally? Why don't the Cheyenne Indians have to give up their boundaries when they have been in noncompliance also?


Is it true that Wyoming has been short changed, our boundary should be north into the Crow reservation? I think this is going to open a whole can of worms and we are never going to see the end of this. The only people benefitting are the attorneys for both sides.

Maybe it is time to evaluate whether the reservation system is actually helping or hindering the Native Americans and what the actual goals of the system are. It appears that one of the goals is to give them constitutional rights superior to the rest of Americans. How is it possible that equal rights and the reservation system are compatible?

I agree that the whole ESA also needs to be re-evaluated. How is it possible that the wolf is an endangered species when there are literally thousands in North America? Does that also make the prairie dog an endangered species since there don't appear to be any left in Rhode Island? Without some better definitions and limitations there could be no end to the animals, plants, and insects that could be listed. Should we also include smallpox and polio? At the very least, we should insist that there be a feasible plan for re-instating a natural population.

Thank you for taking the time to come to Sheridan and for giving us the time to comment on the essential issues.

Sincerely,



Ron Scott

Box 505

Dayton, Wyoming

Robert and Arlene Hanson  
P. O. Box 144  
Wapiti, Wyoming 82450

To: Representative Barbara Cubin

Re: Private Property Rights Hearing  
Sheridan, Wyoming - July 17, 1993

Dear Mrs. Cubin:

We are grateful to you for holding the ESA hearing in Sheridan. Please enter my comments for the public record.

As inholders, with eagles, grizzlies and now wolves encroaching on our property, we are extremely concerned over further government meddling with private property rights. We are excellent stewards of the land and this year, with the grasses more plentiful than ever before, we have seen the abundance of wildlife on our land flourish alongside cattle that are using the same habitat.

ESA restrictions in the future may prevent us from logging dead timber, which we view as a fire hazard to not only our land but the Shoshone National Forest. Will we be able to change land use, burn if necessary, divert water for beneficial projects, continue to graze our property and as sportsmen, continue to have access to our favorite hunting places on public and private land? If not, we will sell all we have for building lots and move on.

The U.S. Constitution is the supreme law of the land, and any statute, to be valid, must be in agreement. The ESA is not and has not conformed to the Constitution. In fact, your earlier remarks about nullifying the entire law are valid. Starting over, and implementing legislation bound by Constitutional law, would be the greatest gift Americans could ask for.

Problems, as we know, are many. We'll try to address our concerns as succinctly as possible:-

1) The Fifth Amendment to the Constitution states that "No person ---shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

Private property takings without due process and compensation under the ESA (cases are too numerous to document here) is unconstitutional and void. No one is bound to obey an unconstitutional law, and no courts are bound to enforce it. Syndicated columnist, Alston Chase, has written that the ESA was never intended to restrict use of private property. He further states that "Property is the sole institution that stands between us and a bottomless political abyss."

2) The ESA doesn't allow Federal agencies to measure the value of the species against economic and social impacts to the people affected. (B) It doesn't measure any costs that society is willing to pay to recover a species. ENVIRONMENTALISTS USE THESE LOOPHOLES TO SHUT DOWN A PARTICULAR RESOURCE ACTIVITY. We need people in the equation. No other law so completely ignores any comparison of costs with benefits.

Economists say the ESA works against people's incentives, not with them. We should compensate those who bear the brunt of saving a species.

more ---

Hanson Comments to Rep. Cubin  
Private Property Rights Hearing, Sheridan, Wyoming  
Page 2 - Cont'd.

3) According to the President's Council on Environmental Quality, there are up to 9,000 plants and animals deserving protection under the ESA. THE GOVERNMENT EVEN WANTS TO SAVE HYBRID ANIMALS. The dusky seaside sparrow is an example (a failed program costing millions), and the red wolf (a cross between a gray wolf and a coyote) is another.

Solution: Use only the biological and numerical definition of endangered species. Only pure species. No federal money should be spent on hybrids. Why is half or all money earmarked for endangered or threatened species being spent on only twelve of them? In 1990, \$55 million went to twelve. In descending order of expenditures: the northern spotted owl, least Bell's vireo, the grizzly, red-cockaded woodpecker, the Florida panther, the desert tortoise, the bald eagle, the ocelot, the jaguarundi, the peregrine falcon, the California least tern and the chinook salmon. The apportionment does not become more equal after the first dozen species - which includes the gray wolf, the southern sea otter, and the Puerto Rican parrot which received the next \$19 million. The remaining quarter of funding - \$28 million, was shared among 570 organisms.

Only species actually threatened with extinction should be listed. The gray wolf is not threatened with extinction, neither the bald eagle or the grizzly. At least 15 of the 16 species that have been delisted, were originally listed in error. "Glamor species" are supported over "creepy-crawlies."

4) Time and expenditure limits must be placed on studies and recovery limits. (After fifty years of intensive management, Whooping Cranes number about 140 birds).

Solution: Independent peer review and field verification of data is required when listing a species. Listings must be based on sound science, not voodoo biology and emotionalism.

The government must recognize that extinction is a natural evolutionary process. To pretend that we are acting to save everything is intellectually dishonest. Nature itself has destroyed 90 percent of life forms that ever populated the planet.

5) The people MUST have a right to protect their livelihoods and control endangered species threatening their livelihoods (grizzly/wolf predation).

6) Inspector General's Audit Report titled "The Endangered Species Program"- U. S. Fish and Wildlife Service (Report No. 90-98 - 1990) states that the U.S.F&WS has not effectively implemented a domestic endangered species program, in spite of the \$8.4 million spent per year on recovery plans.

Solution: The entire program needs to be overhauled or scratched. Congress passed the ESA by a large majority in December, 1993 and Nixon quickly signed it. Neither seems to have had a clue about what they were setting in motion. Even the lavs ardent supporters are alarmed by its inflexibility.

more —

Hanson Comments to Rep. Cubin  
Private Property Rights Hearing, Sheridan, Wyoming  
Page 3 - Cont'd.

7) More Federal monies should be spent for truly endangered species than for threatened ones. As of 1992, average federal and state disbursements were lower for endangered species than for threatened species. The northern spotted owl - \$9.7 million and the grizzly bear - \$5.9 million.

8) State agencies should have primary authority for management and protection of fish and wildlife and their habitats.

Solution: No unfunded mandates.

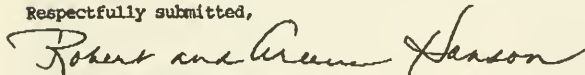
9) Regulatory duplication at the federal, state and local level is problematic.

10) Unclear and inconsistent interpretation and implementation of the ESA is a serious complication which needs to be resolved.

Perry Pendley, President and Chief Legal Officer of the Mountain States Legal Foundation, states that the government's implementation of the ESA is little more than a land grab. We completely agree! We can only hope that our rights are not lost in the welter of compromises that are sure to occur.

\*\*\*\*\*

Respectfully submitted,



Robert and Arlene Hanson

P.O. Box 144  
Wapiti, Wyoming 82450

STATEMENT SUBMITTED BY JAMES PHELPS (2110 Bradbrook court, Billings, MT 59102) TO THE HOUSE "PRIVATE PROPERTY RIGHTS TASK FORCE" HEARING AT SHERIDAN, WY, MONDAY, JULY 17, 1995, FOR THE HEARING RECORD.

With these few words: *"\*\*\* nor shall private property be taken for public use, without just compensation \*\*\*"* enshrined in the Fifth Amendment of the Constitution is one of our most fundamental rights--to own property free of the threat of seizure by government, unless government pays for it.

However, many court decisions over the life of our nation state the right (emphasis mine) to own property carries with said right a duty (again, emphasis mine) to refrain from using it in a manner that would cause harm or injury to neighboring landowners or to the general public.

To say it another way, because the use (emphasis, mine) of land invariably affects neighbors and the community health and welfare, absolute use (again, emphasis mine) has never been considered a protected property right.

As with any law or regulation, there are some horror stories. Some of these are exaggerated, some are not accurate, and some are not true. Those few that are can be corrected without enacting the bad law that is proposed.

It is bad law because (1) It will write into law something President Ronald Reagan's own Solicitor General, Charles Fried, called a radical plan to undermine government efforts to protect the health, safety, civil rights, and environment of all Americans. (2) It will write into law--cast in concrete--the ability of the courts to decide, as they do now, on a case-by-case, what constitutes takings. (3) It will chill the ability of agencies to issue regulations protecting health, safety, and the environment, or anything else, for that matter. And there are other good reasons.

Even in Puritan days, in colonial Massachusetts, property rights were sometimes restricted or abridged in the interests of promoting the common good. Because of overhunting and habitat destruction hunting of deer was regulated--restrictions echoed in today's rules protecting endangered species. As it has become clear the Supreme Court will not give land rights crusaders a total victory, its promoters are carrying their campaign to Congress. One effort is to achieve reimbursement for a perceived partial reduction in value of property. This overlooks that often the reason the property is so valuable stems from its location adjacent to new highways, flood plain protection, or water or sewer lines built by all taxpayers. Perhaps the advocates of private property supreme should also recommend paying every time a government action raises the value of their property?

In early times, with small human population, it was difficult to adversely impact neighbors or their property. We now have millions of people, and safety, health, and environmental laws and regulations are necessary, and do impact, and do hurt. The courts have evolved with the times. They will continue. We should not change the law.--James Phelps.

July 17, 1995

To the members of :

**COMMITTEE ON RESOURCES - 104TH CONGRESS**

Enclosed you will find information pertaining to a property rights taking by the U.S. Government. We are seeking support for a legislative amendment we will attempt to get introduced. We ask you to please take the time to read the material and give it serious consideration. We are ready at any time to verify any statement we have made herein. We will also willingly provide more information at anytime. We have kept it brief because we know your time is valuable. We value your judgment and would appreciate any support or guidance you can give us.

We, the landowners in Parcel #1, thank you for taking the time to read the enclosed information.

For the Landowners,

  
Jim Hamilton

  
Watty Taylor

**BRIEF HISTORY OF THE  
CROW SETTLEMENT ACT OF 1994  
PUBLIC LAW 103-444**

The 1868 Treaty of Fort Laramie established the East Boundary of the Crow Reservation as the 107th Meridian. In 1891 a survey of the 107th Meridian was concluded. This marked survey line became the eastern boundary for all legal purposes. Meanwhile, around 1900, the areas east of the Crow Indian Reservation were opened to settlement under the Homestead Act. Patents and deeds were issued to non-Indian persons and to the State of Montana for most of the surface lands and a significant portion of the minerals in these areas between the 107th Meridian and the 1891 survey line. Sometime in the late 1950's it was discovered that the survey line had strayed to the west, resulting in the exclusion from the Crow Reservation of approximately 36,164 acres.

Legislation to resolve this 107th Meridian boundary dispute was introduced in Congress during the 1960's and 1970's and again in 1992 but no such legislation was enacted into law.

On November 2, 1994, the Crow Settlement Act of 1994 was signed into law. This law, among other things, divided the disputed area (between the 1891 survey line and the 107th Meridian) into 4 parcels. Regarding parcels #2, #3, and #4, the 1891 survey line was recognized and established as the east boundary of the Crow Reservation. On parcels #2, #3, and #4 settlement was made and compensation given to the Crow Tribe in exchange for the lands and minerals they have been deprived of due to the erroneous 1891 survey. On parcel #1 the boundary was moved to the 107th Meridian, resulting in 11,135 acres of privately owned land being placed within the boundary of the Crow Indian reservation.

The government refused to make a settlement with the Crow Tribe regarding the minerals in parcel #1. Instead these minerals were given to the Crow Tribe and the east boundary was moved to the 107th Meridian. The government's reasoning for the boundary move was that the minerals needed to be within the boundaries of the Crow Reservation to protect the Crow Tribe's right to explore, mine, collect royalties and possibly tax these minerals. In so doing, the U.S. government has created the problem that we bring to your attention with this brief history and the following explanation and request for help.

Further information and documentation of this brief history may be obtained through the Congressional Record. An enclosed map also provides information.

## THE LANDOWNER'S PROBLEM

Parcel #1 contains one state school section and 340 acres of BLM land. The rest is owned by ten non-Indian landowners. This land was legally obtained under the Homestead Act. My father came here and homesteaded in 1919. The land was not within the reservation boundary. Much of this land has changed hands since it originally passed into private ownership under the Homestead Act. This in no way alters the fact that it has never been within the boundaries of the reservation. By the passage of the Crow Boundary Act, this land is now within the reservation boundary and its status and that of the owners has changed for the following reasons.

We have been placed under Crow Indian jurisdiction which means that we are subject to their tribal laws including taxation. This represents taxation without representation as we cannot participate in the Tribal Government. We are also subject to double taxation as the State of Montana will not relinquish its right to tax as a result of this boundary move.

Our land has been devalued. Deeded land within the boundaries of the Crow Reservation has a lower market value than identical land outside the reservation.

Law enforcement within parcel #1 has become a gray area. We are told we should use the BIA law enforcement. They are two hours away and have no authority over non-Indians. Our local county sheriffs deputy or Montana Game Warden has no authority over Indians. The result is that we basically have no law enforcement.

The State of Montana bans all big game hunting by non-Indians within the boundaries of the Crow Reservation. We have therefore lost the right to big game hunting on our own private land.

The U.S. Government compensated the Crow Tribe and left the 1891 boundary in place in parcels #2, #3, and #4. In parcel #1 the government moved the boundary to the 107th Meridian instead of compensating the Crow Tribe, thereby harming the non-Indian landowners in parcel #1. We have been discriminated against.

Our attorney tells us that we have a good case against the Government both as a property rights abuse and discrimination. However, litigation is costly and there are only a few of us to bear the expense. Further, the claims court could compensate us monetarily but could not move the boundary. Only the U.S. Congress can do that. Therefore, we are attempting to make Congress aware of our problem.

## CONCLUSION

The 1891 survey line has been the legally recognized eastern boundary of the Crow Reservation for 104 years. In the late 19th and early 20th Centuries these lands were surveyed so that it could be opened for homesteading and the survey lines were based on and ended at the 1891 Crow Indian boundary line. The homestead deeds were issued recognizing the 1891 line as the Crow Reservation boundary. The 1891 line today serves as a legal boundary between school districts. The 1891 line was resurveyed and plainly marked in 1973. Now we are told that by passage of the Crow Settlement Act of 1994, this 104 year old boundary is no longer valid.

Moving this boundary to the 107th Meridian placed roughly 1000 acres of our ranch, including our home and ranch headquarters on the reservation. The other landowners positions are similar.

We feel that our property rights have been severely abused. Something is terribly wrong when we can be placed in a jurisdiction where we have no representation and also have our property devalued. A tremendous property and civil rights taking by the U.S. Government has occurred.

We landowners were never notified that our land was being placed within the boundaries of the Crow Reservation. We were not asked to testify at hearings nor even given the courtesy of a mail survey.

When I learned through the newspapers, in 1992 and 1994 that legislation was being considered to resolve the 107th Meridian dispute, I contacted Senators Burns and Baucus and Rep. Williams. I urged them to settle reasonably with the Crow Tribe, but to never move the boundary. I received no reply from Senator Baucus or Rep. Williams. Senator Burns replied that "all rights will be protected". Surely having your land devalued and placed in a different jurisdiction doesn't mean your rights were protected.

## OUR PROPOSED SOLUTION

We have been told that the boundary was moved to protect the Crow Tribe's rights to explore, mine, collect royalties and possibly tax the minerals they were given under parcel #1. This reasoning is absurd. Minerals are commonly severed from the surface and conveyed to another party by mineral deed. This could have been done in this case with no violation of the surface owners rights.

We are attempting to get Senator Burns to introduce a legislative amendment to the Crow Boundary Act of 1994. This amendment will call for the east boundary to be the 1891 survey line. It will contain language to protect the Crow Tribe's right to explore, mine, collect royalties and possibly tax the minerals that they now own in parcel #1. This will solve both the landowners problem and continue to protect the Crow Tribe's mineral interest.

We ask your support of the amendment if we can get Senator Burns to introduce it. We also ask that you give it your consideration as a member of the Resources Committee. We know that you are a supporter of property rights and feel that our problem merits your attention and consideration. Any support or guidance you can provide us will be greatly appreciated.

For the Landowners,

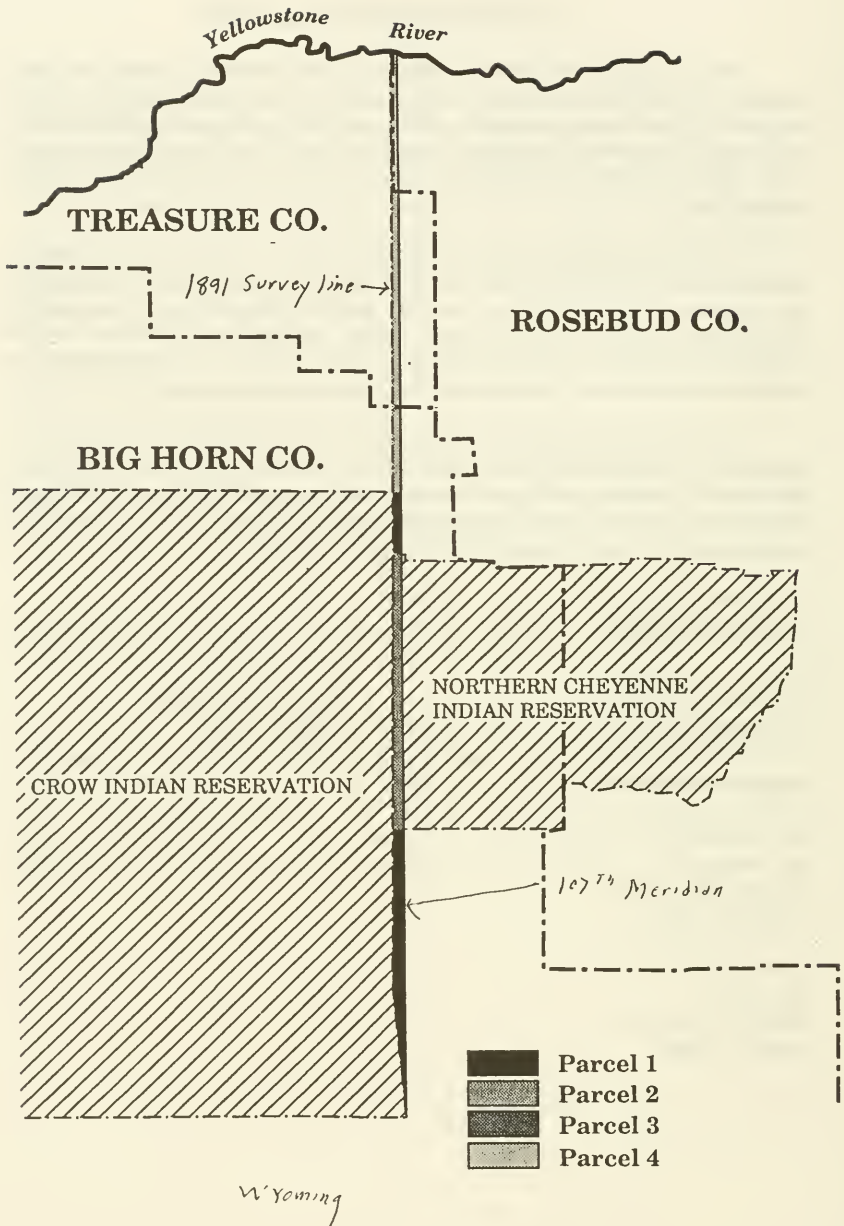
  
Jim Hamilton

  
Watty Taylor

Replies may be made to:

Jim Hamilton  
HC 59 Box 13  
Decker, MT 59025  
(406) 757-2215

Watty Taylor  
Box 595  
Busby, MT 59016  
(406) 757-2236





WYOMING  
OUTDOOR  
COUNCIL

25  
1967-1992

1

August 1, 1995

Private Property Task Force  
Committee on Resources  
U.S. House of Representatives  
1324 Longworth House Office Building  
Washington, D.C. 20515

Dear Mr. Chairman and Members of the Task Force:

Please accept this letter as my comments for the record in follow-up to your field hearing in Sheridan, Wyoming on July 17th. The main theme of this letter, as Paul Harvey says, could be termed "**And Now You Know the Rest of the Story.**"

Many inaccuracies in facts were presented to you from several panel testifiers in Sheridan. In this letter, I present data that I obtained from federal agency staff in Wyoming and Montana. Their side of the story, and in fact, the full story, was never told in many cases. This full story reveals that in all cases I researched--these supposed examples of private property rights abuses caused by federal regulations--simply do not exist.

What follows is brief presentation of the findings of my research on the cases/examples raised at the hearing. At the end of each is a list of the documentation and/or agency contact person and phone number that you can use to pursue your "fact-finding" mission. I encourage you to pursue the real facts and not the stories or hearsay.

#### **J. Harrison Talbott's testimony about the Wyoming Toad**

Mr. Talbott complained about a variety of requirements associated with the protection of the Wyoming Toad, an endangered species, including pesticide use limitations and "toad tunnels," and other foolish-sounding federal requirements. (It was not clear to us from his testimony what actual damage or property rights impacts occurred to his private property.)

**The Other Side:** A local citizen task force was formed to study the issue and devise a plan for addressing Toad habitat and landowner concerns about pesticide use. Public meetings & hearings were held in the area by the Task Force, and the EPA funded an accelerated Toad habitat survey program. A U.S. Fish & Wildlife Service (USFWS) report summarizes:

"County and city government, as well as former Governor Sullivan, environmental groups, local ranchers, the Wyoming Game & Fish Department, and the Wyoming Department of Agriculture supported the Task Force recommendations as well as the accelerated survey program. A few local citizens voiced some concerns pertaining to potential delays in last year's pesticide clearance program. However, all mosquito control areas were searched and released for spraying prior to scheduled spraying.

In essence, land owners were able to use pesticides on their land as scheduled. There was no such thing as a requirement for toad tunnels--that is pure myth. This entire project, in fact, is touted across the state as an example of how solutions can be found that

*25 years of Wyoming Conservation Action*

201 Main

Lander, Wyoming 82520

(307) 332-7031



are win-win for both sides. It is unclear what kind of substantive gripe Mr. Talbott could have when landowners weren't stopped from their traditional spraying.

Contact: Chuck Davis, Ecological Services Field Supervisor, USFWS, Cheyenne office; 307-772-2374.

Documents: 1 page background, history, status report by USFWS.

**Tom Rule's testimony about his 300 acres of wetlands that he "couldn't touch"**

Mr. Rule said he had 300 acres of wetlands that were irrigation induced. The Corps of Engineers would not give him a permit exemption when he wanted to dredge his ditch that runs through the area, and drain some of the upper reaches of the wetlands. Rule claimed that the reports he needed to file for the permit were too costly, and thus he was locked out of any use of those lands.

**The Other Side:** Mr. Rule has approximately 127 acres of wetlands, which he documents in July, 1994 correspondence to the Corps. (He states in that same letter that he has "150 additional acreage that I still hay along side" of the wetlands, "but it is becoming more difficult to maintain and control my irrigation systems on these fields.") In his letter, he states that he wants to clean up an old irrigation channel to a depth of 4 feet, 1 & 1/2 miles long, and other ditches to 2 feet deep, 4,000 feet in length, using a backhoe or contracting with a blaster for the main ditch. Doing this would effect the upper reaches of the wetlands, draining or affecting about 8 acres.

The Corps did a site investigation and determined that what Mr. Rule referred to as a historic irrigation ditch was actually a natural stream channel and a headwaters of a natural water system. They stated that Mr. Rule could not provide any evidence that the waterway was a historic ditch, show that it had been maintained as such in the past (there were no stockpiles) and could not even show that he had ever maintained it as an irrigation ditch in the past. Chandler Peter with the Corps stated that if Mr. Rule had shown it to be a man-made ditch, there would be no question: Mr. Rule would have received an automatic exemption.

The Corps stated that it was a very large wetlands complex and Mr. Rule's proposal of dredging about 1 & 1/2 miles of waterway up to 4 feet deep would probably drain even more than the upper reaches and change the water flow of the wetlands system. They were willing, however, to let him apply for a Nationwide permit, a simpler process, than having to file for an individual permit, because he claimed an impact under 10 acres.

To get this Nationwide permit, Mr. Rule needed to submit a "wetlands delineation," provide a mitigation proposal (an acre for acre enhancement project) and show that he had contacted the US Fish & Wildlife Service and the State SHPO office. The Corps letter outlining these requirements listed the federal, state and private resources available to Mr. Rule to help him with these items. Mr. Peter of the Corps stated to me that probably the Soil Conservation Service could do the work needed for the wetlands delineation free of charge for Mr. Rule, and he told him that. Peter's letter also encourage Mr. Rule to contact the WY Game & Fish Department or the USFWS regarding help developing a mitigation proposal (possibly something like series of ponds).

In fact, it may be that had Mr. Rule pursued his plans, the G&F and USFWS might very well have financed the entire mitigation project under their "Partners for Wildlife" project that supports the creation of wildlife habitat. Mr. Peter states that the Corps never heard back from Mr. Rule after they sent him their response letter in September, although they were "ready to work with him on it...By no means did we say no." Mr. Chandler did not know of the Partners for Wildlife program at the time of his correspondence with Mr. Rule, but found out a few months later.

In summary, Mr. Rule's acreage was not all irrigation induced. The Corps did not require of him a more difficult individual permit, but rather gave him an opportunity to file under a Nationwide permit. The reports required of him in that permit could have been completed for him by a public agency, free of charge, and possibly all mitigation would have been paid for by state and federal agencies as well. In summary, this case could have been another win-win situation where both the landowner achieved his objectives, and the habitat loss was mitigated. It is unfortunate that Mr. Rule was intimidated away from pursuing the permit by the report requirements, and that the Corps did not know at the time about the Partners program. Had Mr. Rule contacted the Corps for help after he received the September letter, probably all of these perceived hurdles would have been overcome. There is no doubt that the Corps reporting requirements can sound overwhelming and they might do more to inform landowners of the options available to them to get permitting assistance--especially at little or no cost. But we believe Mr. Rule's case is far from being an example of a taking. He simply failed to pursue a permitting process, that if explored, would have shown to have been manageable, not as costly as feared and would have resulted in a permit issued.

Contact: Chandler Peter, Project Manager, Cheyenne Regulatory Office, Department of the Army, Corps of Engineers; 307-772-2300.

Documents: July 1994 letter from Rule to Corp; September '94 letter Corps to Rule; Soil Conservation Service 6/94 letter to Rule; Corps fact sheet on Wetlands exemptions.

#### **Dr. David Cameron's testimony regarding the Montana Arctic Grayling.**

Dr. Cameron said his family wanted to introduce the Montana Grayling (not an endangered species) in a stream flowing through his Montana ranch. Friends warned him away from pursuing this because the native fish might get listed as an endangered species and this would cost him trouble. We never understood from his testimony what was supposed to be the "takings" of his property or abuse of property rights.

**The Other Side:** At Dr. Cameron's request the Montana Grayling Workgroup coordinated by the USFWS evaluated the stream on his property for suitability as grayling habitat. The one mile stretch has low flows and lots of non-natives than made it rather questionable habitat. (IE, the fish might all die there.) They rated the area as low priority for reintroduction, but said it might serve as an experimental introduction site. Dr. Cameron never contacted the Workgroup after this field research, never attended a workgroup meeting, and simply took no action to pursue his goal of introducing the fish to his lands, or even contacted the USFWS. USFWS staff said they would have worked with him to pursue this goal, if they had the fish available. We do not understand why this is any kind of example to slam the Endangered Species Act, because the Mt. Grayling Workgroup is working very closely and cooperatively with ranchers and other landowners to increase the viable population of the fish so it won't have to be listed. Right now there is no special protection for the fish and the agency is working with the public so there will be no need. There is no evidence of private property impacts. Dr. Cameron simply gave up his project on his own without contact with the agencies involved.

Contact: Lori Nordstrom, Montana Arctic Grayling Workgroup member, US Fish & Wildlife Service, Ecological Services, Helena, MT; 406-449-5225.

Documents: Kaya, C.M. 1992. Restoration of Fluvial Arctic Grayling to Montana Streams: Assessment of Reintroduction Potential; Report to the Montana Chapter of American Fish Society, Montana Department of Fish, Wildlife & Parks, USFWS, USFS.

#### **Testimony of Nancy White about prairie dogs on federal land at Ft. Mackenzie.**

Ms. White said that the prairie dog colonies at Ft. Mackenzie are devaluing all the neighboring lands. The colony is protected because of concern for habitat for the endangered black-footed ferret, and one has to apply for a permit from USFWS before you

can poison them. Three assessments have been done over 30 years and still the prairie dogs are not controlled.

**The Other Side:** The Fort Mackenzie VA Hospital has 270 acres remaining to it. There are currently no prairie dogs residing at Ft. Mackenzie, according to Dale Morrison, the chief engineer for the hospital, although a few dogs may once and a while establish burrows on the edge of the grounds. Most of the peripheral hospital grounds have reverted to tall stands of native grasses and shrubs, and thus are not good habitat for prairie dogs.

In the '40s, the federal surface rights of the old Fort were sold to private landowners. There is a dog town of approximately 600 acres adjacent to the fort that is private property. The USFWS has no record of anyone contacting them regarding prairie dog towns on or near Fort Mackenzie, and thus, "would assume that the private landowners could institute control consistent with the rodenticide label restrictions." Since there are no dogs at the complaint site we can not understand what is the problem!

Contact: Chuck Davis, Ecological Services Field Supervisor, USFWS, Cheyenne office; 307-772-2374.

Documents: August 1, 1995 Memo to Public Affairs Office, USFWS.

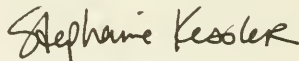
After an examination of the facts, all these examples of so-called "regulatory takings" have shown not to be the case. Three cases didn't even show any documented problem, and the fourth, Tom Rule's wetlands case--could have been resolved had he simply continued the permitting process.

I again urge the Task Force to look at the statistical data I provided you regarding actual wetlands permits denied and/or jeopardy decisions issued regarding endangered species in Wyoming in my earlier written testimony. That factual evidence, along with the facts I have provided here, debunk the myth of gross private property abuses or "takings" by federal agencies.

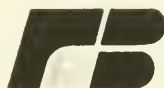
Since I was limited to 5 pages of follow-up testimony, I am unable to include here the many pages of documentation that support these research findings. If you are truly interested in legislating on facts, versus tales and antidotes, then I suggest you contact the agencies listed above and hear their side of the story. If you contact me, I will also be glad to provide you with this documentation.

Thank you for this opportunity to set the record straight.

Sincerely,



Stephanie Kessler  
Legislative/Issues Director



# SHERIDAN COUNTY FARM BUREAU

312 Coffeen Avenue  
Sheridan, WY 82801 (307)672-7479

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Nancy White  
P.O. Box 186  
Ranchester, WY 82839  
(307) 655-2375

August 10, 1995

Mr. John Shadegg, Chairman  
Private Property Task Force  
Room 1328, Longworth House Office  
Washington, DC 20515

Dear Mr. Shadegg,

I recently testified in Sheridan Wyoming about the problem we've had with prairie dogs moving on to our property from lands called Fort McKenzie.

In last night's paper- August 10th, there was an article, which I'm enclosing disputing what I said.

First of all, let me say there is a VA Hospital at Fort McKenzie, but pastureland is under jurisdiction of the Department of Engineers, Omaha. Second - There was originally more than 4520 acres in Fort McKenzie and the government elected to give a section to Sheridan county for a rifle range and recreation area. The remaining land is leased to a rancher and is used by the National Guard. It is very much there, prairie dogs etal.

I understand the Outdoor Council has sent a letter to you, to be in congressional record, saying there are no prairie dogs on the Fort land.

Mr. Davis of the U.S. Fish and Wildlife has only been in Cheyenne for four years, and obviously does not know the area here and the V.A. Administrator of the Hospital probably doesn't know anything about the lands which he does not administer.

Therefore I wish to say the Outdoor Council is not correct. Mr. Davis is out of town, but the person I talked to in Cheyenne told me this morning she would arrange a meeting with him and us and newspaper representatives.

Mr. John Shadegg, Chairman  
Private Property Task Force  
August 10, 1995  
Page -2-

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In closing, let me say we leased the pasture at Fort McKenzie with several people years ago and join it for close to three miles. I doubt if the person or persons from Outdoor council who wrote you have any idea where this area is and we will invite them to come see it when Mr. Davis returns.

Sincerely,

Nancy H. White

NW/sv

cc: Debbie Callis, Deputy Chief Clerk

# Confusion surrounds control of prairie dogs

By Robert Waggoner

Staff reporter

A large prairie-dog town near Sheridan has created confusion regarding who is responsible for controlling the rodents.

The confusion stems from last month's congressional hearing in Sheridan concerning the "takings" issue.

Among those to testify was Ranchester rancher Nancy White, who says the federal government is ignoring a prairie-dog infestation on government land west of the Sheridan Veterans Affairs Medical Center.

White, representing the Wyoming Farm Bureau, said her family and other ranchers are paying thousands of dollars each year to control rodents moving from the government land onto their property.

White referred to the land as "Fort McKenzie" in her written testimony, and apparently that is where the problem started.

After reading a newspaper article about White's testimony, Chuck Davis of the U.S. Fish & Wildlife Service in Cheyenne met with VA officials in Sheridan to tour the area west of the hospital.

There are currently no prairie dogs residing on Fort McKenzie, though (the VA's chief engineer) reports there are occasionally a few dogs who establish burrows on the edge of the hospital grounds," Davis said in an Aug. 1 letter.

"Beginning in 1938, when old Fort McKenzie closed (except for the hospital), the federal surface rights to over 3,000 acres were sold to private landowners," he said.

Davis said he observed a prairie-dog town of approximately 600 acres immediately west of the hospital property on the Wrench Ranch (also known as the Rice Ranch).

His comments prompted the Wyoming Outdoor Council (WOC) based in Lander to contact White.

testimony.

"Since there are no 'dogs' at the complaint site, we cannot understand what is the problem," said WOC in a letter to the U.S. House of Representatives' Private Property Rights Task Force, which conducted the hearing in Sheridan.

When contacted this morning, White said her testimony was referring to government land west of the VA and Wrench Ranch that is owned by the U.S. Army and used by the National Guard for training purposes.

PK ranch owner Don Roberts, who leases the Army land for cattle grazing, said efforts have been taken to control prairie dogs on the land, but agreed there is still a problem on the government land and surrounding private property.

White said her family began contacting politicians and state and federal agencies in the early 1970s in an effort to get something done with the prairie dogs on the Army land since the animals were moving onto their property.

White said that Roberts four years ago finally "prevailed upon

Please see Confusion, Page 2

(Continued from Page 1)

(Gov. Mike Sullivan) to help us." Control efforts took place for two years, but then stopped, said White, noting that the government's lack of control on its property is costing her family and others.

Davis said, "We are aware that there is a considerable amount of prairie-dog control every year in Sheridan County."

But, he noted, "We have no record of anyone contacting us regarding the dog towns on or near Fort McKenzie, and would assume that the private landowners could institute control consistent with the rodenticide label restrictions."

WOC said the testimony by White and three other landowners at the hearing "debunk the myth of gross private property abuses or 'takings' by federal agencies."

STATEMENT PREPARED FOR SUBMISSION TO THE  
COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

July 10, 1995

Prepared by: Joseph R. Geraud, Professor of Law Emeritus  
(University of Wyoming, 1955-92). Taught  
courses dealing with Property, Natural  
Resources, and Federal Public Lands. Since  
retirement in 1992, the author has assisted  
with the affairs of the Fremont Sheep Company,  
his family's corporation, which has been in  
existence since 1907 and engaged in an open  
range sheep grazing business in Fremont  
County, Wyoming.

Subject: How federal laws and regulations affect the value  
of privately owned property.

## Private Property Issues In General

My professorial background compels a few observations with regard to the underlying concept of "private property." While the 5th Amendment to the U.S. Constitution provides "No person shall be...deprived of life liberty, or property, without due process of law...", the fact remains that there is no existing definitive law as to what constitutes "property" within the meaning of the constitution. The courts provide definition when needed in the absence of legislative direction. Generally, state law has provided basic definition of what constitutes property and the federal courts were obligated to recognize the law of the State. When needs of government have required acquisition and possession of land, the power of eminent domain is normally utilized and it provides for compensation to the land owner. The U.S. government was not given constitutional authority for exercise of the power of eminent domain, but the U.S. Supreme Court held that such power was a necessary incident of sovereignty and it noted that the only limitation upon federal exercise of eminent domain powers is "undue or unplanned burdens on the public fisc." (United States V. Gettysburg Ry., 160 U.S. 668, 680 (1876). In other words, government can utilize eminent domain power so long as it has the funds to compensate owners for their loss.

In more recent years, it has been the exercise of the "police power" by governments, state and federal, which has acted to restrict uses of land, and in many instances, destroyed land values. This invasion of traditional rights of possession and use held by land owners does not require payment of compensation by the government and there is no limit upon such "regulatory takings" in the form of the public fisc. The police power can be described as a government's ability to regulate private activities and property usage without compensation as a means of promoting and protecting the public health, safety, morals and general welfare. Today's courts are struggling with fact situations in which the issue is whether there has been a regulatory "taking" which justifies compensation to the landowner. Various judicial decisions provide complex issues dependent upon a judge's evaluation of a variety of factors such as the near-complete frustration of investment-backed expectations; the diminution of the property's market value as a result of regulation; and perhaps most significantly, the absence of a reasonable remaining economic use. In any contested case, the taxpayers must pay if the court concludes a "taking" has occurred because of the protection afforded by the 5th Amendment. If in fact laws and regulations enacted as exercise of the police power cause loss of use or value of the property, it would seem only right and fair that the taxpayers compensate the landowner. One can only speculate as to the reaction to an increase in taxes to provide compensation to landowners because of the loss of use or

value caused by legislation or regulations promulgated on the sometimes vague theory of the "public welfare." For many years the courts have deferred to legislative exercises of police power affecting land use on the theory legislative bodies are delegated power to determine what best serves the general welfare although individual land owners will suffer demonstrable detriment and will be not compensated because the action is characterized as exercise of the police power. Predictably, many exercises of police power would not come into being if the legislative action carried need for an appropriation to compensate landowners. A recent Supreme Court decision gives indication that it will not give as much deference to legislative decisions as it had in the past. (see, *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987)).

One wonders whether the Congress, or other legislative bodies, have ever given consideration to expectations of people founded upon their ownership of land when legislation is enacted which will cause loss of historical rights of ownership to fall upon a few people. If the general public truly supports such actions, they should be expected to provide compensation, and the legislative body should provide guidance for such compensation. Under the existing system, the injured party is forced to file lawsuits and litigate the matter, with the governmental body resisting such efforts through use of a publicly supported legal staff with vast resources at their disposal. It is relatively simple to achieve results and decisions when the sovereign clearly proceeds to exercise the power of eminent domain and everyone understands compensation will be paid for proven losses; but exercise of the police power obviously carrying burdens upon private land owners for the benefit of the "general welfare" inevitably leads to years of extensive litigation to determine whether a regulatory taking has occurred which does require compensation.

The concept of "property" embraces much more than land ownership, and it is an institution created by society. The only dependable foundation of personal liberty is the economic security of private property. Our legal system is based upon an evolving common law as modified by legislative actions of the appropriate body to whom power has been delegated. Our legal system establishes the framework within which all economic and social activities take place or are planned. If people cannot effectively plan within the existing framework, we can only expect a high level of frustration or failures of expectations, and general unrest on the part of the affected individuals or entities seeking to secure their economic future.

The Congress has managed to enact many pieces of legislation with significant impact upon private landowners. Much of the impact is theoretically lessened by opportunities

on the part of the landowner to participate in planning and decision making administrative proceedings which are intended to provide a record of decision making which explains why ultimate decisions are made. For a variety of reasons, these procedures are costly or beyond the means of private landowners, extend over periods of years, a source of delay to the point individuals abandon plans, and generally leave one of the participating parties in a position to challenge the decision through judicial proceedings. Unfortunately, the rules of the game needed for planning social and economic affairs are gradually being replaced by procedures to be followed by any number of participants (dependent upon financial resources) espousing a variety of concerns in a process which has no predictable result. This general observation of "law" today is peculiarly applicable to private landowners and lessees of state lands scattered within the vast areas of federally owned lands.

For a more expanded analysis of the foregoing statements, the reader is referred to the following: Geraud, "Wyoming Land and the Law One hundred Years After Statehood -- A Perspective," XXVI Land and Water Law Review 33 (1991, Univ. of Wyo., College of Law)

## Federal Programs Affecting Value of Private Lands

Reported judicial decisions reflect many impacts upon private lands resulting from implementation of federal programs. Impacts vary dependent upon the region in which lands lie. Peculiar impacts can be identified in the Western states in which federal ownership of lands is extensive. A complete listing is beyond this statement. Three judicial decisions are illustrative of how private values are diminished.

1. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

This case represents a major change in what was considered to be the law in that it construed the property clause of the U.S. Constitution as authorizing Congress to legislate on any subject it determines to be related to the ecology of the public lands. The decision displaced historical state powers to regulate wild animals within the state.

On the facts, the result of the decision is that a private landowner cannot chase wild-free roaming horses and burros from their land, nor can the State do so under customary estray laws. A landowner's only protection from such animals eating his corn, alfalfa, etc. is to call the Bureau of Land Management to remove them. The vast area of lands and remoteness of BLM personnel make such a remedy illusory. Indeed, the BLM is completely unable to monitor the location of these animals throughout the western states.

2. *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986).

The railroad grant to the Union Pacific created a checkerboard of private and federal sections of land across southern Wyoming. Wild horses roam this large area as it basically is an open range without fencing. BLM admitted the horses were feeding upon privately owned forage on every alternate section of land. Landowners filed this action to cause removal of the horses and to obtain compensation for the forage eaten by the horses. They did get an order for removal of the horses (this has never been implemented), and the trial court denied that there had been a "taking" of forage. A three panel court of the Tenth Circuit found that there had been a "taking," but on rehearing, the full court concluded there was no taking. The court refused to consider forage as an annual crop constituting property subject to taking. It characterized the wild horse act as "nothing more or less than a run-of-the-mill regulatory scheme enacted by Congress to insure the survival of a particular species of wild animals." The latter rationale was given despite the BLM's admission there was an over population of wild horses. The probable true rationale for the decision is that the

majority of the court believed a different decision would have sweeping implications for the enforcement of all environmental regulatory statutes. This is an issue which must be considered by the Congress: must private landowners use their land in a manner conducive to support of wild creatures protected by Congress without compensation? The Endangered Species Act does compel such a conclusion, but the Wild Horse act does not. Indeed, horses are supposed to be removed from private land under the Act. From the perspective of a Wyoming rancher, the forage growing on the arid lands of southwestern Wyoming is the only renewable resource representing any value of the land's surface. The forage can be consumed only once in each season of growth. It will support only a given number of cattle, sheep, antelope, deer, elk, and horses grazing on the land. The affected livestock operators pay a fee for their grazing on the BLM lands, but the United States pays nothing to the private landowners on which the protected animals graze.

It is to be recognized that "fencing" of private lands is not a solution. The Tenth Circuit has held that private landowners cannot fence their lands within the checkerboard so as to interfere with lawful purposes of the public lands, including the migration of antelope seeking winter forage (United States v. Bergen, 848 F.2d 1502 (1988)). Fencing would also result in lack of access by livestock and wild animals to water which is scarce in this region. The history of much of Wyoming reflects that livestock grazing on the open range has been the best economic use of these lands and ranchers have been dependent upon such use. Available water dictated the location of homesteads so that most water is located on private land.

### 3. Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988).

The grizzly bear has been designated under the Endangered Species Act as a threatened species which cannot be taken except in limited circumstances. Glacier National Park in Montana provides natural habitat for the grizzly bear. Certain lands adjacent thereto are privately owned and used for grazing by domestic sheep. An owner of sheep leased the private land and commenced grazing activities. One or more grizzly bears subsequently killed a number of sheep. Appeal to federal officials for help resulted in unsuccessful efforts to trap the offending bear. One evening while a federal trapper and the owner of the sheep were on the land, two grizzly bears emerged from the forest and one of them moved toward the sheep. The sheep owner shot and killed the bear. Shortly thereafter the owner removed his sheep from the land and obtained a cancellation of his lease. In accordance with the ESA, the owner was fined \$2,500. Thereafter, sheep owners instituted a lawsuit seeking an injunction against federal officials restraining them from enforcing the ESA and its regulations when private owners are

defending their property. The injunction was denied and affirmed on appeal. The plaintiffs asserted a fundamental right to kill wild animals in defense of their property, but the court said the Constitution does not explicitly recognize a right to kill federally protected wildlife in defense of property and it would not infer such a right. It is ludicrous to search the Constitution for authority to kill wildlife because federally protected wildlife was unknown until recent years. It mattered naught to the Court that the Supreme Courts of Wyoming and Montana had both held in the past that individuals have a limited right to kill wild animals in defense of property. These state courts established that such a right is a recognized attribute of property.

The plaintiffs in the case also sought compensation for the "taking" of the sheep because the federal government in effect requires the sheep owner to let the grizzly feed on the sheep. The claim was rejected because the federal government does not "own" the grizzlies nor does it control the conduct of such animals. The plaintiffs cited the principle that "it is axiomatic that the Fifth Amendment's just compensation provision is designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." This principle was held to be inapplicable because the ESA and regulations did not "force" the plaintiffs to bear any burden. Apparently the court felt the sheep owner could take his sheep elsewhere or get out of the business.

As previously noted, the sheep owner was able to obtain a cancellation of his lease. This reflects the fact that the private land involved is now worthless for purposes of sheep grazing because it abuts federal land serving as habitat for grizzly bears who will roam afar in search of food.

It is to be noted that the ESA does not purport to directly "take" any property, personal or real. Indeed, the ESA authorizes federal departments to acquire land when necessary to carry out a program to conserve wildlife. However, so long as the "law" permits a protected species to roam and wrest its sustenance from private property, there is little justification to seek federal funding to acquire new public land needed for habitat.

Historically, states such as Wyoming have declared wildlife to be the property of the State and have maintained statutes controlling treatment of wildlife. Wyoming law has provided for compensation to landowners when wildlife causes injury. Wyoming law specifically authorizes the taking and killing of protected predators by owners of property when the predator is doing damage to private property. These local laws reflect the values recognized by the people of the

State who live within local conditions.

The foregoing three judicial opinions reflect a pattern of Federal legislation and activity which seeks to deny fiscal responsibility on the part of the United States for the loss of property values resulting from federal programs. If "property" is to continue as the foundation for freedom essential to the planning of an individual's social and economic future, it is incumbent upon Congress to provide legislative direction as to what constitutes a "taking" and provide relief. If a few individuals suffer loss of historical and existing uses of land without practicable alternative use, compensation should be paid.

#### The Fremont Sheep Company and BLM Decision Making

The question of how federal laws and regulations affect the value of privately owned property can produce many various responses. My current association with the Fremont Sheep Company as a family stockholder, Director, and Secretary has provided another illustration of impacts upon value of privately owned property.

In the fall of 1993 we determined that we could no longer continue an open range sheep grazing operation because of a variety of circumstances (including loss of wool incentive payments and increased predation by coyotes). We sold all sheep (about 9,400 animals) and commenced seeking buyers for our privately owned lands, state leases, and BLM grazing permits. We met with Bureau of Land Management personnel in the Lander, Wyoming office in April of 1994 to discuss our prospects for sales. At this time, and ever since, there has been no interest exhibited by ranchers to acquire lands or permits for the grazing of sheep. However, cattle operators were interested. We were advised that there would be no problem in converting our grazing permits from sheep to cows on a 5 or 5.5 o l basis, which has been historically the fact. We duly filed a formal application for the conversion. After some delay and a written request for action, we received a letter dated November 9, 1994 in which the Area Manager of the Lander Resource Area advised us that they would be unable for a period of 1 to 5 years to authorize conversion of our permit on the Green Mountain Allotment because of the need to complete an Environmental Assessment and to impose an allotment management plan controlling grazing practices of all 18 permittees in the allotment. Prompt conversion action was taken on the conversion of our winter range permits from sheep to cows, which are located in a different grazing allotment.

The Green Mountain Allotment encompasses an area approximately 40 by 17 miles lying in Fremont County south of the Sweetwater River. Within this area, we own approximately 3,700 deeded acres, hold leases on 9,000 acres of State

school sections, and hold BLM permits for 10,134 sheep AUM.s. Land holdings consist of tracts of land varying from 40 to 360 acres scattered throughout the area. The Fremont Sheep Co. has grazed sheep in this area long before and ever after enactment of the Taylor Grazing Act. Private landowners, lessees of State lands, and the BLM agreed long ago that all operators would graze in common as there is no significant fencing in the area. For the past twenty years, the Fremont has been the only sheep operator and has shared the range with 17 cattle permittees. Our permit from the BLM makes it possible to graze our unfenced private lands and State leases in conjunction with surrounding BLM land. Specifically, we are permitted to have use of 10,134 Animal Unit Months within the allotment from May 5 to November 25 of each year.

Although wool and lamb prices have risen dramatically during the past year, we still have had no offers from sheep operators. Because of the lack of a conversion to cows, we are unable to realize any economic benefit from our private lands or State leases. It is impossible to put cows solely on these lands because they are not fenced and would move in trespass upon BLM land. These lands are basically treeless with little aesthetic appeal and miles from any utilities or town with available services. Most of these lands are located on water which supports the needs of cow permittees and wildlife which wander throughout the allotment. We are simply trying to salvage something from past investments by selling our land interests. Sales of sheep were used to help pay past debt. We cannot afford to restock with sheep and no one else wants to. One might conclude that open range sheep grazing in this particular area is no longer viable and that grazing as a multiple-use of the federal lands will attract only cattle operators.

The point for committee consideration of how regulations affect the value of privately owned property is that the delay mandated because of the need to complete an Environmental Assessment and development of an allotment management plan has effectively "taken" the only economic use for which these lands are suited: the grazing of cows. We would welcome any suggestions as to how we could realize on any economic value. It would only be just and fair that past practices related to conversion from sheep to cows be continued until completion of studies and plans. We could at least derive lease income on an annual basis from cow operators.

At the present time, the BLM Handbook H-4130-1.71B contains guidelines for animal unit conversions and allow a 5 to 1 ratio when allotment specific range survey information is not available to develop a different conversion ratio. Conversion of sheep grazing to cow grazing and vice versa is a function of market conditions. Historically, grazing permits have been issued for Animal Unit Months which are

based upon one cow or five sheep. There has been no rule or regulation restricting them to one type of animal.

When we received informal approval in April of 1994 for a conversion of sheep to cows on a 5 or 5.5 to 1 basis, our AUM's were valued at approximately \$207,000. After receiving notice of the delay in making a decision on the conversion, a value of \$41,500 has been placed on them for purposes of a sale of the permits. No offers have been received. With regard to our deeded lands and State leases, we are only hoping for offers as there is no market by which to measure their value in the absence of action on our conversion request which would permit cattle grazing on the Green Mountain Allotment.

In the meantime we realize no benefit from our holdings. Wildlife and cattle graze freely on our deeded land and state leases. Much of the value received by current cattle permittees of the BLM is the ability to graze and water on our holdings. Our only alternative to prevent such practice would be to withdraw our holdings from the Green Mountain Allotment plan and fence our lands. Such an action would benefit no one and be a detriment to livestock grazing and the habitat of wildlife.

We have received no information as of this date from the BLM as to the status of development of a grazing plan or an environmental assessment. The Deputy Director of the Bureau of Land Management advises that we still have valid sheep permits and that the complex situation will take time to resolve. Statutes and regulations are cited as the cause for delay. Our suggestion for a conversion to fewer cows for a limited time has been rejected by the BLM.

My father and his brother, immigrants from France, worked their lifetime to build a grazing business. My oldest brother devoted his life to the business and after his death my younger brother continued until 1993. They worked to acquire private lands and state leases so as to have a solid basis for utilizing available grazing privileges on federal lands. However, the BLM rejects our suggestion, in part, because purchasers of our permits on a temporary basis would make investments and have expectations. What did my family do? Our problem is that the rangeland sheep business is no longer economically appealing and present policies favor reducing the number of cattle on the range.

#### Summary

Federal laws and regulations clearly affect values of private lands and property in many ways. The most serious situations are those in which property is "taken" in fact, e.g., the forage eaten by wild horses, the sheep eaten by grizzlies, etc. Consideration should be given to withdrawal

by the Congress from areas in which state law has been preempted by federal law affecting wild animals and other areas in which local decision would best protect the expectations of people living in the area.

Consideration should be given to how owners of private lands surrounded by federal lands can have a more secure or better defined expectation as to use of their land and federal land when supposed co-operative plans are to be followed for the management of public land grazing.

Past and existing practices in the grazing of public lands should be permitted to continue until all studies, evaluations and environmental assessments are completed so as to avoid uncertainties as to possible future use of the land and the immediate loss in value of intermingled private lands. Changes in policies should be announced for a specific future application date so as to enable individuals to plan accordingly.

Attachment to statement submitted to the Committee on  
Resources date July 10, 1965

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Subject: How federal laws and regulations affect the  
value of privately owned property.

- A. General observations as to "property" and how it  
may be taken by governmental action.
- B. Illustrations of denied taking claims arising from  
acts of wild animals protected by federal law.
- C. Loss of value of private deeded lands and leases  
surrounded by BLM lands due to delay in decision  
upon request of grazing permit holder for conversion  
from sheep to cows.
- D. Recommendations

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